VOLUME VI

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 241

SUNKIST GROWERS, INC., ET AL., PETITIONERS,

vs.

WINCKLER & SMITH
CITRUS PRODUCTS CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 20, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

No. 15242

United States
Court of Appeals
for the Ninth Circuit

SUNKIST GROWERS, INC., a Corporation and THE EXCHANGE ORANGE PRODUCTS COMPANY, a Corporation,

Appellants,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a Corporation and RONALD WALKER, Trustee,

Appellees.

Transcript of Record

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Volume VI

(Pages 2425 to 2900)

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

Mr. Strachan: Let me talk with the witness just a moment so we won't overstep what your Honor has said about describing this in general terms.

The Court: All right.

Mr. Dixon: Before the jury comes down, your Honor, may I raise another question? We have this BR here——

The Court: Wait just a minute until Mr. Strachan can hear you.

Why don't you let me lay your foundation? Since I have told you that I am going to sustain an objection, why not let me lay the foundation, and we will have no problem? [2906]

If you don't think I do it right——

Mr. Strachan: I think I have the responsibility to do it. I am just outlining a method.

The Court: I am not intimating that you can't do it properly, but I thought we would save some time.

You want to do it?

Mr. Strachan: Yes, I think I would.

The Court: Mr. Dixon has a question he wants to raise with you.

Mr. Dixon: Counsel, do you intend to offer BR in evidence?

Mr. Strachan: We didn't have enough copies. I am going to offer it in evidence, but I am not going to distribute them to the jury.

Mr. Dixon: I am going to object to it, your Honor, and I might say at this time that I will state the grounds of my objection, unless your

Honor wants it to be made in the presence of the jury.

There is no identification——

The Court: I assume the identification will show that this came from some of the records of the Winckler & Smith Company.

Mr. Dixon: All we know about this exhibit is what is on it. There is no identifying mark of any kind as to who made it, what it relates to, or anything else, other than what is on the face of the exhibit. [2907]

Now, whether this was an estimate, whether this is an actual cost analysis based upon a run record, or what it is, the plaintiff does not know.

As I stated, there are no identifying marks anywhere on the copy of this exhibit that has been handed to us, which would indicate who made it, or would indicate when it was made, or what it is based on, whether it is single-strength——

The Court: In other words, your objection would be on the lack of foundation?

Mr. Dixon: Absolutely.

The Court: We don't know what foundation defendants will lay.

Mr. Strachan: The foundation is that it is one of the documents that was furnished us by the plaintiff pursuant to the discovery orders of this court.

The Court: That wouldn't be enough.

Mr. Dixon: From what file?

Mr. Strachan: They ought to know what file.

Mr. Dixon: No, we don't.

Mr. Strachan: I could find out.

I am very much surprised at this attitude. They ought to know what file they picked the things out of that they furnished to us.

Mr. Dixon: Counsel, be sensible.

The Court: That is not the particular point. The [2908] particular point is what significance does it have.

What do you expect this will prove, Mr. Strachan?

Mr. Strachan: This is a cost analysis found in the books and records of Winckler & Smith corporation.

Mr. Dixon: What book, counsel?

Mr. Strachan: It is File 50.

Mr. Dixon: There isn't any File 50. That is the mark put on there by Mr. Williams, who may have got it somewhere. Whether he got it from the wastebasket, or where he got it, I don't know.

The Court: What do you expect it will prove?

Mr. Strachan: It shows what the actual cost of cans, cartons, and labels was as recorded in the books and records as of the month of September, 1951.

Mr. Dixon: Then tell us from what books and records they came, counsel. That certainly is not a book, and it certainly is not a record of this company that we would ever agree could be charged against this company, or the authenticity of which we could concede or admit.

As I previously stated, there are no authentication marks on the document showing when it was

made, by whom it was made, or to what it relates.

Mr. Strachan: Let's get the original document in here. This is a photostat of an original, which is in your possession. [2909]

Mr. Dixon: We don't have it, counsel. I don't know.

Mr. Strachan: I don't know where we got it if the officers of this court in charge of the plaintiff's affairs didn't furnish it, your Honor.

The Court: You apparently made the photostats, so you must have had the original when you made the photostats.

Mr. Strachan: And returned it to them.

The Court: Who did you return it to, and who returned it? Let's find out where the original is.

Mr. Strachan: If I could get Mr. Williams over here I could probably find that out.

The Court: Look into it tonight. Let's get the jury down.

Mr. Strachan: Can we use it subject to its being connected up?

The Court: Start in and lay what foundation you can, but if there is an objection to the foundation, you can't pass it to the jury until a foundation is completed.

Mr. Strachan: We are going to hit this right away.

Mr. Dixon: That is why I am raising the question.

The only information that we have with reference to this—and that number is apparently Mr. Williams' number for his own information—it is

purported to be work papers for the month of September, whatever that means, 1951. Work papers. It is not part of the books or records of this [2910] company.

Mr. Strachan: Where does it say work papers? It says Cost Analysis Month of September.

Mr. Dixon: This is Mr. Smith's record of what was made available to Mr. Williams.

Mr. Strachan: I am talking about the face of this document. Winckler & Smith Cost Analysis Month of September, 1951.

Mr. Fisher: One of the items of the discovery was cost analyses prepared by the plaintiff Winckler & Smith. I think, given a few moments, I will be able to identify that file.

Mr. Dixon: We want to know who made it, the source of it——

Mr. Strachan: Ask Mr. Winckler.

Mr. Dixon: I am not asking Mr. Winckler, counsel. I am asking you. You are offering it. You tell us, will you, please?

The Court: The point is this: First of all, it is not books, and probably not records. It is out of files. If it is a work paper, that is one thing. If it has been used for some purpose, that is another.

Plaintiff is at a disadvantage here in connection with this matter. At least Mr. Dixon is, in not being able to say particularly what it is. But take a work sheet, you are working on your income tax, and you have made a work sheet out, but you didn't use it, you found something you wanted to [2911] change, so you made another work sheet out; it is

possible that eventually you might be able to hook one of those earlier work sheets up if you are trying to prove fraud, or something, and they might all wind up admissible to show intent. But without being hooked up, they couldn't be used, just a work sheet.

If this has been used by the company, is considered by it as a record, or something, that is one thing. If it is some calculation which did not become final, was not used, that is another thing.

Of course I think the plaintiff has some obligation to try to find out what it is, if it can be found out, if Mr. Winckler knows what it is. He is not here today, and neither is Mr. Williams. If Mr. Winckler knows what it is, and how it was used, that is one thing. Or if somebody who knows what it is is available.

Mr. Dixon: If the court please, Mr. Williams, this is his number, I am informed, this 50. Mr. Williams is the one that got it. And what he got it from, or when he got it, I don't know. No one here can tell me anything about it—and where he got it—except that apparently when thousands of other documents, material, was made available to him back in 1952 or '53, this work sheet—that is what it is referred to as—is listed in Mr. Smith's report. [2912]

The Court: Let's go ahead.

Mr. Strachan: Mr. Fisher is trying to look this up, your Honor. I am very much surprised at this turn of events.

Mr. Dixon: You shouldn't be, counsel.

Mr. Strachan: Because a copy of this was given to Mr. Dixon five or six days ago and I had never heard of any objection up until now. Papers that came from the files of the plaintiff corporation have not required foundation to be laid other than that.

Mr. Dixon: Until you use it, I can't object.

Mr. Strachan: I assumed until this very moment, and I still think it is a fact that this document is precisely what it shows on the face of the record. It is a cost analysis in the month of September. This is a regular form. September has been put in by handwriting. It shows standard costs, referring back to certain accounts accumulated up to August 31, the total accumulated up to September 30. It has many indications right on its face that it is a regular record kept in the ordinary and due course of business. I am quite sure that is what it is.

Unless somebody comes in and says it isn't, it is just a piece of scratch paper, I think it is presumed to have come from their records and to have enough authenticity to be received in evidence, and if there is anything about it that it appears to be that it doesn't prove, it seems to me the [2913] burden is on the plaintiff to qualify what appears on the face of this record.

Mr. Dixon: That certainly is novel, counsel. An unsigned document from which—I don't know what use you are going to try to make of it, but you are certainly not going to charge the plaintiff with anything contained in this unsigned document unless it is done over my objection.

This document, along with, I might say, hundreds of others, your Honor, was apparently secured by Mr. Williams October 13, 1952, in the early part of this case, and the copy which we have to which we are referring, and from which we identify the note at the right-hand corner of this document with the initials for 50, Mel Williams file entitled working papers for the month of September, that is the basis under which they now try to introduce an unsigned document into the record as evidence of the costs of this corporation. Work papers made by whom and for what, and were they ever used or relied upon by the corporation?

The Court: Bring the jury in.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: Let the record show the jury present.

FRANCIS A. REGAN

Direct Examination

By Mr. Strachan:

Mr. Regan, are you familiar with the computations which the witness Hodge made as the basis of his estimate of the loss or profit which Winckler & Smith might [2914] have had if they had obtained 12,000 tons of Valencia oranges in the processing season of 1951 and processed those under the same terms as the TreeSweet Company processed Valencia oranges in that year? A. I am.

(Testimony of Francis A. Regan.)

Q. Have you made any studies to determine whether or not that estimate would be correct or incorrect as a result of having assumed that the processing costs for the year 1951 would have been the same as they were in the processing season 1949?

A. May I have that read back?

Mr. Strachan: I will put the question again.

Q. Have you made any studies to determine to what extent, if any, the estimate was affected by having used 1949 costs instead of 1951 costs?

A. I have.

The Court: By 1949 costs, you mean the year ending January 31, 1950?

Mr. Strachan: 1950; yes. I was using the processing year 1949 as being the year ending with January, 1950.

The Court: All right.

Q. (By Mr. Strachan): What studies did you make in that connection?

A. I examined the costs to the plaintiff for cans, cartons, and labels for the year 1951 and compared such costs [2915] with the amount set out in Exhibit 69.

Q. In order to arrive at an estimate or a computation of the cans, cartons and labels cost, did you make an analysis of the various sizes of cans that were packed by TreeSweet under its contract?

A. I did.

Q. And did you then assume that the canning of juice of this mythical 12,000 tons by Winckler-Smith would have been in the same proportion as

(Testimony of Francis A. Regan.)

the sizes which you found that TreeSweet had used?

A. I did.

Q. Will you tell us how you went about that computation?

A. I determined first of all that under the TreeSweet contract TreeSweet ultimately delivered a total of 2,382,744 gallons of juice, which yield was obtained from a total of 24,148.19 tons.

I then determined from examining the results under the TreeSweet contract the sizes in which the juice was ultimately packed.

As a result of this analysis, I found that .7 per cent of the total gallons was put up in size 48/5½ ounce cans. I determined that 6.19 per cent of the gallons was put in 48/6 ounce cans. I determined that 5.75 per cent of the gallons was put up in 24/12 ounce cans. 19.7 per cent [2916] was put up in 24/18 ounce cans, and 67.66 per cent of the total gallons was put up in 12/46 ounce cans.

Q. What was the next step in your computation after having made that determination?

A. I then determined the manner in which the actual tonnage was packaged. I applied those percentages to the mythical 12,000 tons to determine how many tons would be used of the 12,000 mythical tons in the 5½ ounce and the 6 ounce sizes, and so on. I then used, having been determined the——

Q. How many tons would that be for each of those sizes?

A. This analysis resulted in determining that under that basis 84 tons would be used for the 5½

(Testimony of Francis A. Regan.)

ounce size; 74.8 tons in the 6 ounce size; 690 tons in the 12 ounce size; 2,364 tons in the 18 ounce size, and 8,119 tons in the 46 ounce size. Those individual items total 12,000 tons.

I then used the yield of 100 gallons of single-strength juice to each gallon——

The Court: Each ton.

The Witness: Each ton of raw fruit. I determined then how many gallons would be distributed and packaged in the respective sizes.

The Court: Then by formula reduced it to cases?

The Witness: Then by formula determined the number of [2917] ounces in each size. I determined how many ounces in a case and determined then how many cases would be packaged in each size.

I then determined from the plaintiff's records how much the cans, cartons and labels would cost in each size for each case. Having the number of cases, I then applied that to the cost per ton for each item and determined thereby how much the cost of cans, cartons and labels would be under the contract.

Q. (By Mr. Strachan): And what did that amount to according to the computation?

A. I determined that the total cost of cans, cartons and labels would be $288,992.48.

Q. How does that compare with the amount allowed for those items in the computation by the witness Hodge?

A. Mr. Hodge in his testimony stated that in his computation he used $15.17 per ton for cans, $2.01

(Testimony of Francis A. Regan.)

per ton for cartons, and $1.17 per ton for labels, a total of $18.35.

Applying that to a volume of 12,000 tons results in a figure of $220,200 even, or $68,792.48 less than I have determined Winckler & Smith would have had to pay for cans, cartons and labels in the respective sizes.

Q. That is your computation as to the amount by which the use of 1949 costs reduced the estimated cost in the Hodge computation; is that [2918] correct? A. That is correct.

Q. Now, have you made any studies to determine the selling expenses that should be allocated to the sale of the product of this hypothetical 12,000 tons had Winckler & Smith processed and sold that tonnage? A. I did.

Q. Will you tell us what studies you made in that connection?

A. My study included a review of the selling expenses as appear in the books of the plaintiff for the years 1949 through 1952, and also for the years 1946 and 1947—rather, the year ending January 31, 1947, and the year ending January 31, 1948.

Q. Will you tell us what kind of a review and study you made?

A. As to the years February 1, 1949, through January 31, 1952, I determined what accounts were included among the sales expenses.

Q. And what accounts did those include?

A. I do not have that paper on the stand with

(Testimony of Francis A. Regan.)

me at the present time, but generally from memory, the accounts, the expenses included salaries and commissions to salesmen, brokerage, freight out, advertising discounts and probably 10 more accounts, all of the type that would be related to the distribution function of a business, the selling effort [2919] of the business.

Q. Based on that review of the accounts, what conclusion did you reach?

A. Reviewing the sales accounts and sales expenses over the years I noted the relationship between the sales expenses and the amount of sales that that sales effort covered by the expenses produced.

I noted that in the year ended January 31, 1952, the expenses, included none related to the sale of single-strength juice. [2920]

Q. That is the expenses actually incurred?

A. That is right.

I found that over the years the company averaged about 8 per cent of its sales in selling expense.

I also recall that Mr. Winckler testified that that was the amount of sales expense to anticipate in the distribution of single-strength juice.

I had previously calculated the 8 per cent prior to that time, however.

Based upon the review of the expenses it was my opinion, based upon that examination, that the company would experience an 8 per cent ratio to sales in selling expense to market additional product.

Q. Is it your opinion, based upon that study, and also upon your experience as a public accountant,

(Testimony of Francis A. Regan.)

that sales expense does vary in practically direct proportion with the volume of sales?

A. I have found that within my own experience. And I have also known that often sales expense increases as volume goes up, as the result of the amount of effort that must go in to produce the last dollar of sale. To increase demand, often sales expense will increase in volume and in percentage to the amount of sales that are produced.

Q. Then, I take it, that based on your examination with respect to this particular case, and upon your experience [2921] generally, your study of this subject of selling costs, you think that an allowance of 8 per cent for Winckler & Smith's selling costs on this additional volume would have been experienced, is that correct? A. That is correct.

Q. Now, as a result of that, what is the difference between the selling expense that you would attribute to this additional tonnage over and above what was allowed in the computation of the witness Hodge?

A. Mr. Hodge in his computation included an item of 3 per cent for brokerage, or $22,500, as the additional expense that would relate to the additional 12,000 tons.

Q. Would that brokerage be included in but only a part of this selling expense as you have computed it?

A. That brokerage would be a part of the 8 per cent, the same as the 1½ per cent discount and other related expenses to the distribution of the product, it would be included in my 8 per cent.

(Testimony of Francis A. Regan.)

Q. Now, will you tell us approximately what is the excess by which your computed selling expense would exceed that allowed in the Hodge computation?

A. I determined that the sales expense would be at least $60,229.62 total, which is approximately or should be $34,729.62 more than was allowed by Mr. Hodge in his computation. [2922]

Q. Is it 34 or 37?

A. Pardon me. Thirty-seven thousand.

Q. What is the correct figure?

A. $37,729.62.

Q. Did you, likewise, make a study concerning the general and administrative expense that would have been incurred had this additional 12,000 tons been processed and the product disposed of by Winckler & Smith? A. I have.

Q. Will you tell us what studies you made?

A. I examined the general and administrative expenses for the three-year period, the years ending January 31, 1950, 1951, and 1952, along the same lines as I have testified relative to my examination of the sales expenses.

Q. Now, will you mention some of the accounts included in that general classification which would be increased as a result of the increased production in sales activity attributable to the assumed 12,000 tons?

A. Well, the administrative expenses, as carried in the plaintiff's records, included the expenses related to the operation of the office of the company,

(Testimony of Francis A. Regan.)

costs related to the maintenance of records, costs related to the maintenance and preparation of payroll records, correspondence expense relative to correspondence, expenses of that type, anything related to the operation of the office functions of the [2923] company.

Q. Were you able to form an opinion as to the approximate amount which should be allowed for additional general and administrative expenses to provide for the processing and selling of the 12,000 tons? A. I have.

Q. Will you tell us how you did that?

A. I reviewed the records, particularly of that last year, and noted that the company on its books had total administrative costs of $93,000. And during that year they produced and processed 8,000 tons of raw fruit. I then examined those accounts to determine to what extent those costs would be increased if in addition to the 8,000 tons the company processed 12,000 additional tons. Based upon that examination I estimated that the administrative expense that would be increased—the increase in the administrative expense would be no less than $40,000 and somewhere between $40,000 and $60,000.

Q. That is assuming that the operations would have been increased by—well, to about 250 per cent of what actually occurred, is that correct?

A. That is correct.

Q. So the 250 per cent increase in processing and selling activity would, according to your compu-

(Testimony of Francis A. Regan.)

tations, have increased the general and administrative expense from what— [2924] $93,000?

A. Well, if you start with a base of $93,000, it should fall somewhere above 133, putting that 12,000 tons on top of the actual production.

Q. Have you examined the computation of the witness Hodge, as testified to by him, and as illustrated on Exhibit 69, for the purpose of determining how much general and administrative expense he allowed for in his computation? A. I have.

Q. Would you tell us about the study you made and the results of it?

A. Well, examining 69 I first note that—and I am referring to the longhand insert in the upper part of the exhibit—there is a statement in brackets, "Includes $56,417.38 G and A." I add that $56,417.38 to an amount that Mr. Hodge added subsequently in his computation of $37,296.11, and I find a total of $93,714.49, which is the exact amount of the general and administrative expense that the company experienced in that year. However, I then looked at the figures that Mr. Hodge used in arriving at his $34.06 cost per ton. That $34.06 per ton cost is identified on Exhibit 69 as W and S processing cost computed on 1949 basis, and then in brackets follows the statement "Includes $56,417.38 G and A." The total per ton is $34.06.

In his testimony Mr. Hodge included therein an item of [2925] $3.07 for G and A, general and administrative expense. If I multiply $3.07 by 12,000 units, I find a total of $36,840.

(Testimony of Francis A. Regan.)

I cannot come up with $56,417.38, which that figure is supposed to include.

Q. The consequence of that is that in the Hodge computation there has been omitted approximately $20,000 of the $93,000 of general and administrative expense, which actually was incurred?

A. That is correct. The actual figure is $19,577.38.

Q. So that instead of having increased the general and administrative expense due to the expanded activities in connection with the 12,000, the Hodge computation has actually allowed for less than the experienced general and administrative expense?

A. That is correct. The amount that is included is less than they actually had for the entire year.

Q. It is approximately $70,000, is that correct?

A. About that. About $74,000.

Q. And that differs by how much from what you think would have been the minimum general and administrative expense?

A. It would differ to the extent of $59,577.38.

Q. Now, in addition to those matters have you made any studies or computations to determine whether there was anything omitted from the Hodge computation, as made in the testimony, and [2926] as illustrated on Exhibit 69, by which the actual cost of the raw fruit has been assumed to be less than the raw fruit would have cost or did cost the TreeSweet company under its processing contract?

A. I have.

Mr. Dixon: If the court please, I object to the question, since there was no evidence and no con-

(Testimony of Francis A. Regan.)

tention made by the plaintiff that any cost of Tree-Sweet would be incurred under the contract for the fruit.

The Court: Can we incorporate here our discussion in the absence of the jury? Can there be incorporated here our discussion and positions of counsel made in the absence of the jury?

Mr. Strachan: I think procedurally that is quite acceptable, your Honor.

The Court: Probably this question is not objectionable, but what it leads to I am going to sustain an objection to.

Can you go into something else and take that up as soon as the jury leaves?

Mr. Strachan: I would like to take it up now.

The Court: It is almost 4:30. You will get off two minutes early.

Ladies and gentlemen of the jury, you are excused until 10:00 o'clock tomorrow morning. Remember the admonition of the court. Court will remain in session. [2927]

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

Mr. Witness, there is one thing I didn't follow you on. You gave what you called an increased processing cost—$200,000, was it?

The Witness: An increase in processing costs over the actual costs, your Honor.

(Testimony of Francis A. Regan.)

The Court: Over the 1949 cost as computed by Hodge?

The Witness: The cost that I was testifying to referred to cans, cartons and labels.

The Court: Yes.

The Witness: And in respect to the cans, cartons and labels cost the increase was $68,792.48 over the cost that Mr. Hodge used. Whether they were the 1949 costs is a question that I did not resolve in my own mind. It is the cost he quoted as the 1949 cost.

The Court: Is that figure shown anywhere in BS for identification?

Mr. Strachan: I think we can derive it, your Honor.

The Witness: It would be, sir.

Mr. Strachan: I believe on Schedule I, which is at the top of the third page, you have the can cost, the carton cost, and label cost by size. I think it is derived from that, is it not, Mr. Regan? [2928]

The Witness: What page was that?

Mr. Strachan: On the last page under the Schedule I.

The Witness: That's right.

Mr. Dixon: If that is the source of it, then, counsel, I would like to inquire of this witness where he got that information, as to whether it is based upon this Exhibit BR.

The Witness: BR?

Mr. Dixon: I mean for identification.

The Witness: Yes, sir. It is based in part and

(Testimony of Francis A. Regan.)

in part on the actual invoices appearing in the records of the plaintiff now in the Sunkist Building, the invoices which we have segregated and which are available over there.

The Court: So far I am only concerned with this. I was following some of your matters such as on page 2 of BS, A, TreeSweet Production, B Plaintiff Production, and then you branched off into this matter which I thought pertained to some of your figures on I, but I did not go further.

The Witness: Yes.

The Court: Now, what do you offer to prove, Mr. Strachan? That this witness made a computation involving the oil part of the product and made a computation of what would be returned to EOP under the TreeSweet contract and arrived at the figure of $114,127 as shown on the Exhibit BS, and if Winckler & Smith had processed the same oranges, for the oil product there would have been returned to EOP only [2929] $39,262.50, and that, therefore, there would be less of a return to EOP in the case of Winckler & Smith, the difference being $74,864.

Mr. Strachan: I don't think that is the way I would express the offer, your Honor. I think I would express it this way.

I offer to show that commencing with, I believe it is Exhibit 67, it appears from the plaintiff's exhibits that the cost of raw fruit to the processor under the TreeSweet arrangement was determined by two factors. One is the amount realized from

(Testimony of Francis A. Regan.)

sales of juice after deducting certain allowances and paying certain costs. The other is the value of oil after paying certain costs.

The Court: Now, that is not the cost of the product to the processor. This may be Sunkist's return.

Mr. Strachan: I don't distinguish between the cost of raw fruit to the processor and what the processor gives to the vendor of the fruit for the raw fruit, and because of that I would show——

The Court: Maybe we will save some time. I don't agree with you. You can bring out from this witness his computation on oil return under EOP, but don't have it tied in with 69. When you want to get ready a compilation, you can submit one you have got and you can submit another one. I will sustain objection to the one you have got and you can use [2930] another one.

Mr. Strachan: As long as we are talking about not referring to Exhibit 69, I will make an offer to show, if allowed to proceed with this line of examination with this witness, that the computation as illustrated on 69 and as testified to by the witness Hodge does not include in the costs to the processor the portion of the cost of raw fruit that is represented from the return of oil, but deals only with such part of the cost of the fruit as is met by the return from juice sold, and that therefore the computation of Hodge, both from testimony and in the exhibit, constitutes an erroneous computation of the gain or loss from processing

(Testimony of Francis A. Regan.)

the hypothetical 12,000 tons, and results in a statement of profit according to Hodge instead of a loss if the full cost of the fruit were taken into the computation.

The Court: Just a minute. That offer is made in connection, solely made in connection with your contention that this can be tied in in a comparable computation to Exhibit 69. I am going to permit you to make computations about this oil otherwise, so I take it this offer of proof now is limited to a contention on your part that you may use this computation to make a comparable computation with that of Exhibit 69.

Mr. Strachan: I wouldn't so limit it, your Honor. I would say that that offer of proof is an offer to show that there has been a basic omission from Exhibit 69. [2931]

The Court: Then you are saying the same thing.

Mr. Strachan: I may be.

The Court: You are talking about 69. Mr. Dixon?

Mr. Dixon: Your Honor, I can only repeat what I have said before with reference to this testimony that is being offered on the oil question.

The Court: Well, if you can only repeat what you have said before, then it can be repeated by reference.

Mr. Dixon: Yes.

The Court: You object on that ground?

Mr. Dixon: Yes, I object upon that ground.

(Testimony of Francis A. Regan.)

The Court: Objection sustained to the offer of proof, only insofar as it purports to be some comparison with 69, because I think you and I understand each other that I am going to permit you to make calculations about oil separately, but not talk about that in comparison with 69. The objection is sustained for the reason that 69 was a computation of what Winckler & Smith would have made had they had 12,000 additional tons.

Assume they get it on comparable terms, namely, they had to return the oil to EOP, as did TreeSweet, then whether or not Winckler & Smith's oil recovery was more efficient or less efficient than TreeSweet's is beside the point, and any comparison of this calculation with 69 which takes into account what EOP would have received from the program is [2932] not proper as a comparison with 69 and would be unfair and would confuse the jury.

That it is proper to have in this record, but not as a comparison to 69, what EOP would have gotten out of the deal.

Now, there is still one loose end on it, that is that although I am not going to permit you to show that Winckler & Smith's recovery for comparison purposes—not going to let you show for this comparison purpose Winckler & Smith's recovery was less than TreeSweet's would have been, it still may be a factor of—well, let me understand this. TreeSweet turned the oil back to EOP?

Mr. Dixon: Yes, your Honor.

The Court: Turned the oil recovered back.

(Testimony of Francis A. Regan.)

Mr. Strachan: What's that?

The Court: TreeSweet turned the oil recovered back to EOP.

Mr. Strachan: They were paid a fee for extracting the oil and turning it back.

The Court: Now, my question is, would it be proper to show what Winckler & Smith would have been paid for extracting the oil?

Mr. Dixon: If the court please, if the defendant here can show that Winckler & Smith would have lost money in the operation of extracting the oil under the contract with TreeSweet, [2933] that evidence, I suggest, might be competent to show, along with anything else they can produce, that the contract would have been a losing contract to the plaintiff.

The Court: That is what I have been thinking about.

Mr. Dixon: But the other has no relevancy.

The Court: Defendant would be permitted to show what Winckler & Smith would have been paid for extracting this oil and what it would have cost them to extract the oil.

Mr. Dixon: Right.

The Court: As part of this computation, this comparable computation. That has nothing to do with other proof that you offer independently on the other issue, namely, should Sunkist have given Winckler & Smith this contract for processing, Sunkist's return under the oil would have been less than its return would have been had the contract

(Testimony of Francis A. Regan.)

been given to TreeSweet. That comparison independently of this problem that we have got now——

Mr. Dixon: That would certainly——

Mr. Strachan: I think it would be highly prejudicial to the defense here to allow that Exhibit 69 to go to the jury as if it is a comparison of comparable and similar terms, when actually it has as a basic fallacy underlying it the assumption that Winckler & Smith for some reason that nobody can explain would have been allowed to get 12,000 tons of fruit at about $7.00 a ton less than TreeSweet actually had to pay for it. [2934]

The Court: No. Look, look. I don't follow you at all. The assumption is that Winckler & Smith would have got 12,000 tons. You can attack that assumption, and you can attack that assumption on the basis that they wouldn't have got it, under your contention, because, for one reason Winckler & Smith's—if you can prove this—Winckler & Smith's processing of oil was less efficient, since the oil went back to Sunkist, and therefore Sunkist could have got a better return from TreeSweet, and therefore they wouldn't have given them the contract.

But Exhibit 69 was based upon that assumption. If it is bad, all right, but don't mix the matter up by the difference between the attack on that assumption and a contention that in figuring what Winckler & Smith would have made, which is what you finally arrive at in BS, you can take into account

(Testimony of Francis A. Regan.)

what EOP would have received from the oil transaction.

That is the departure from logic.

Mr. Strachan: Your Honor, I don't think there is a departure from logic, if you take a look at Exhibit 67——

The Court: 67, Mr. Strachan, was a comparison on a different basis. It was a comparison of what the situation would be if plaintiff went out and bought $40 fruit, and what the situation was with TreeSweet, and Silzle, who were not buying $40 fruit but had these contracts.

Mr. Strachan: All right. Now we take the next step. [2935] We are assuming that the plaintiff, instead of buying $40 fruit is buying fruit on the same terms and conditions that TreeSweet bought. So we look at the second page—we look at the last page of Exhibit 67 and we find out, or 66—it is 67, the foot of the second page of 67, the amount per ton Sunkist obtained for oil and peel, $10.81.

The Court: I am not going to talk about this further, because I have made it clear, certainly because there the comparison was what did Sunkist get for their fruit through the Silzle and TreeSweet contracts, what did Sunkist get for their fruit when they sold to the plaintiff at $40 a ton. That is the comparison.

The only thing that I am limiting you on the offer of proof that I sustained an objection to was to make a comparison to 69 by this oil product busi-

(Testimony of Francis A. Regan.)

ness. I am not limiting you from proving what you want to about oil product, but I don't think it is fair to inject that and tie it up with a calculation that is supposed to be comparable to 69.

Mr. Strachan: We both have our views. Perhaps there is room for a difference of opinion, your Honor.

The Court: Maybe. Maybe I am wrong, and maybe I am right. But I haven't made this decision here; I have been over it two or three times. I told you in the record Friday night how I reasoned it out, and I talked to you again about it. [2936]

Is there anything further?

Mr. Dixon: Your Honor, of course, I object, further, to this exhibit on the ground that the foundation has not been laid for some of the figures that are contained in it.

The Court: This exhibit hasn't been offered. He made an offer of proof orally as to what he was going to prove, and the offer was tied up and limited to comparisions with 69. [2937]

* * *

The Court: The record will show the jury absent.

Mr. Strachan: May it please the court, I asked for this conference so we could take up some matters having to do with documentary evidence.

The first matter I would like to have presented is the question of the necessity of foundation for the admission of the document that was identified as Exhibit BR, which was a schedule from the cost

analysis records of the company. I have asked Mr. Williams and Mr. Stark, who participated in the discovery procedures, to discuss that matter.

The other matters that I want to take up arise out of discussions we had Friday and at other times yesterday concerning the documents having to do with our analysis of costs and profit and loss on the 12,000 tons, and in particular I would like to discuss with your Honor three new documents that we prepared last night, and I submitted them this morning to Mr. Dixon.

I would like to have those discussed in advance so we won't unduly disturb the jury or delay it. [2941]

The Court: Have they been marked for identification?

Mr. Strachan: They haven't as yet. I can have them marked.

The Court: Mark them. [2942]

* * *

Mr. Stark: Your Honor, with regard to the exhibit identified as BR, which appears to be a cost analysis, I would like to state for the record the background of that exhibit.

On July 9, 1952, a motion under Rule 34 was filed by Exchange Lemon Products Company in which the fourth category requested was, "Cost analyses prepared by or for plaintiff and work sheets used in the preparation thereof." That motion was argued on September 8, 1952, and we took the various items in the motion one by one, and at page

60 of the transcript on that argument we find the only reference to that category, at which time Mr. Reich simply stated that he was prepared to furnish the cost analyses which were requested.

The Court then orderd the inspection of documents in the Winckler & Smith plant on October 13, 1952.

At the time of that inspection Mr. Fisher, Mr. Williams and myself were at the Winckler & Smith plant, and in a room adjacent to Mr. Winckler's room were furnished documents stacked on a table which were in answer to the categories requested.

This particular document, cost analysis, and companion documents of a similar nature were the only ones answering this category which were furnished.

Mr. Williams was actually in charge of the physical inventorying of these documents, did the marking of the documents, [2944] and I think probably can give a little better statement from the time we got to the plant as to how we acquired them and how the documents were found, but they were specifically covered in the discovery order which was entered in 1952.

Mr. Williams: The process we followed, your Honor, was to put a number on the documents that were shown to us so they could be identified in the future as having been displayed to us. That procedure was followed here. Exhibit BR is a part of a general file to which we gave the number 50, and each page of that file was given a sub-number, 50-1, 50-2, and so forth.

That file 50 is one of a group of files of cost analyses running over the years mentioned, 1950, and all of 1951, and the files are similar in nature.

After we put the numbers on the documents, the documents were taken out to a microfilm machine operated by an operator from Remington-Rand who brought the machine down there right in the plant. The documents were microfilmed and then they were reassembled in the same order in which we received them and were turned back to the Winckler & Smith Company.

I find in looking at our files that I have with me today the files from No. 44 through No. 52. 44 is a group of papers for the month of March, 1951. They run through November. Each one of these files has in it a cost sheet like Exhibit BR. The first one for March is a handwritten sheet. Each of the [2945] next ones are either typed or mimeographed. I cannot tell from the copies that we have. The figures are the same as to cans, cartons and labels on these exhibits, insofar as the typed figures go.

The Court: You say a file for each month?

Mr. Williams: There is a file for each month.

The Court: Beginning with what month?

Mr. Williams: The file I have with me begins March, 1951, and runs through November, 1951.

The Court: And other papers in the file, [2946] too?

Mr. Williams: Yes, there are quite a number of sheets in each file. The first one is about 29 or 30 pages, and they run about that number for each file.

The Court: We ought to make some kind of a record here. Do you concede what Mr. Williams has said and what Mr. Stark has said as being correct, Mr. Dixon?

Mr. Dixon: I am in no position to question them, your Honor, and if counsel says that is what happened, states that as his statement, that is sufficient for me.

However, I think, as I stated yesterday, the only record that we have on this matter at all is a copy of a summary of some 75 files that were apparently turned over to Mr. Williams and Mr. Stark, and/or Mr. Fisher, during the week of October 13, 1952, in which there appears the number 50, along with the other numbers, and a lot of other different symbols and numbers, and on the 50 number, which is apparently the one that Mr. Williams put on Exhibit BR, the only thing that we have is the statement, "File entitled Work Papers for Month of September, 1951." That is as far as the identification of this document goes.

I am not questioning the fact that this BR has at the top what is contained on the document, of course, and that it undoubtedly was among the material, the vast mass of material, apparently, that was turned over to the defendants during this week. However, my objection goes to the document [2947] on the ground that it is not the best evidence of what it purports to contain, that it is not identified as to who made it, it does not show on its face whether this is a work sheet in preparation for a computation of a final statement, or to just what the product

refers. I mean this witness has endeavored to refer to this document in making his computation as indicating and relating to the cost of single-strength juice. It is not in dispute, your Honor, in the record, that there was no single-strength juice produced by the plaintiff during the year in question, in which this report was apparently prepared, particularly the month of September, 1951, or during the entire processing season of 1951.

Now, we are asked to admit this document as indicating the basis from which this witness, Mr. Regan, computed his figures, with reference to the cost of processing single-strength juice by this plaintiff in the year 1951.

As I indicated a moment ago, I know the rules of evidence are liberal with reference to the admission of documents, particularly where they are contained or taken from the files of the party against whom the document is attempted to be used. But here we have something that is obviously contained in a work file, a work paper file. It is wholly unidentified as to who made it. We have no opportunity whatever to cross-examine anyone, assuming that it would be desirable to do so, to determine the basis under which this document was made. [2948] as to whether it was just a guess. I don't mean a guess, but a computation that was prepared for comparison purposes, or for what purpose this was prepared.

So that it seems to me that there must be a greater foundation laid for the use of this document

than merely to contend that because it was contained in a working paper file, along with literally thousands of other documents, the file being entitled "Work Papers for Month of September, 1951," that it is usable against the plaintiff in this action for the purpose for which it is endeavored to be used. And I again say that let's assume that it was properly identified, let's assume that this was part of the records of the company, the fact still remains, your Honor, that this record at this stage of the proceeding clearly shows that this company, the plaintiff here, against whom this document is intended to be used by the witness, did not produce any single-strength juice at all in 1951. [2949]

The Court: Well, that point I don't agree with you on, because although I think there was some small amount of juice produced, I don't think there was any produced in September.

Mr. Dixon: Well, that was for samples, yes, your Honor. I am excluding that. There was none sold.

The Court: You have injected into the case this suppositious 12,000 tons which you say you could have made and therefore an issue arises as to what would it have cost you to have made it.

However, the other part of it does give me some concern. This document was obtained in October, 1952.

Mr. Stark: That is correct.

The Court: We have had all this time whereby a deposition could have been taken or an interrogatory requested for admission. All those things

could have been done. Any one of them would have put plaintiff on notice that this was a document you were going to use. The fact that you took hundreds and thousands of documents, that you microfilmed books and all, doesn't supply the requirement that there should be some notice to the parties as to what you are going to use, which of them you are going to use. And more important, you took no steps to identify it.

In my thinking, I draw a big distinction between such things as books and records, journals, checks, contracts, and as to all those things there has been no question. When they [2950] are produced, the plaintiffs say, "That's right, that is part of our books and records."

But when you get into the field of work papers, even though this has at the top the statement, "Cost analyses," you get into another field.

Now, take your work in working on a case. You certainly wouldn't want to feel some work papers you prepared, just leaving out the work product exemption, but some work paper you had prepared, a complaint or some tentative computation, would be binding on you unless there was some showing it was something you had relied on or used, or take a computation you made for income tax purposes. You might have a series of work papers.

Now, in criminal prosecutions for income tax violations, there are cases where work papers upon being identified and tied in with some final result can be used, but they still don't come in just because they are work papers. You may find a work

paper where a man has been juggling around a certain figure and trying it in various places, and then the figure winds up somewhere else and it is proved it was in his handwriting, and the first thing you know the work paper then becomes admissible.

It seems to me that the difficulty here is: was this a cost analysis used by the company which they should be bound by, and it seems to me, also, that there may be other ways [2951] to identify it.

You apparently have had some very good auditors here. I notice here Account 430, 9/31/51, $71,000, less Account 430, 8/31/51, $61,800.

We would assume that these accountants have run those figures down to see where they are tied into the books of the company.

Mr. Stark: Your Honor, if I may make a couple of comments on this, so far as our not having notified the plaintiff or not having taken further depositions, or anything of that nature on this subject, Mr. Strachan stated yesterday this comes as a complete surprise to us, because we checked specifically, and it was ordered specifically in a separate paragraph that they produce cost analyses, and in the documents which were produced for us were these sheets which are labeled cost analyses, and although the file may be titled, whether by Mr. Williams or by the company, I am not sure, on the original certainly, the sheet Mr. Dixon has, is a list which Mr. Williams made for his convenience, but the original file may be titled work papers.

But the way the papers are kept does not indicate they are work papers in the sense of scratch papers.

They are an orderly series of summations on all of the different subject matters that the company's bookkeepers and accountants would keep in a month. They were classified together in one file, [2952] a file for each month, and they were furnished to us in answer to a request for their cost analyses.

To say now that these are not the cost analyses and we should furnish them more foundation as to what these are seems to me to come at the thing backward. We specifically asked for it. This is what was produced. We feel we are entitled to rely upon the face of the document and the fact that it was produced to us in reply to that request.

The Court: Now, if in the ordinary case where such a request was made and a pleading or a document was filed saying, "Here are the cost analyses." I don't think there would be any question that you are right.

Mr. Stark: No, that is not the——

The Court: But we both know what the situation was here where you had to look at the files and the files were turned over to you to look at them.

Mr. Stark: No, your Honor.

The Court: As far as producing for you specified papers, even your statement here shows that——

Mr. Stark: No, your Honor.

The Court: ——that these files were turned over to you and you indexed the complete files as they were. [2953]

Mr. Stark: This situation, your Honor, you must recall is not the situation which existed in the latter stages of discovery. At the time of this discovery

Mr. Walker was employed and being paid $500 a month to operate the plant, Mr. Smith was at the plant full time, Mr. Pendergast, the fruit buyer, was at the plant. The plant was in operation. It was a going business, be it all in the possession of a trustee. We were not given freedom to go through the files. These were specific items which were laid out and were produced for us.

And, in fact, I recall in the particular instance asking for something not covered by the order and being informed by Mr. Smith that those categories had been segregated and we were not to have anything other than those categories. Which was entirely proper. But I think it is indicative of the state of the plaintiff's business at that time.

It is our position that these are business records kept in the normal course of business. They are not work papers assembled and thrown away, but they were business records entered on a mimeographed form, filed in a file monthly, and whatever Mr. Dixon's objection seems to me, it seems at most to go to the weight of the evidence and not to its admissibility.

As far as not being able to identify who it was that prepared the document, that surprises me, because we had a [2954] rather definite understanding, so far as I was concerned, between Mr. Dixon and myself, before this trial began, that documents coming from the files of either company that had been produced on discovery would not require foundation of that nature, that is, technical foundation.

Certainly on the basis of that understanding we made no objection to the production of any of the documents that we furnished. I mean made no objection.

The Court: That is generally true, because so far we have had contracts and checks, letters, and things of that sort. You should, in fairness, concede that at least we are in a little different field than these other documents.

What about this matter of tying this in to the records? Have your accountants checked to see whether these figures correspond with figures in these records?

Mr. Strachan: Yes. Some of them do. I am not sure how completely we can do it.

What the accountants have done with respect to BR, for example, is to examine vouchers for the purchases of cans of certain sizes, and certain cartons, and certain labels. They haven't been able to get every size and every kind.

The Court: Have they specifically looked at account 430——

Mr. Stark: I am informed that the items you mentioned, the specific account references, have been checked and do tie [2955] into the records. But that doesn't mean every item on the page.

Mr. Strauhan: I would just as soon have Mr. Regan tell you to what extent he is able to tie it in, your Honor.

The Court: Mr. Regan, you have been sworn; just come forward and let me ask you some questions.

FRANCIS A. REGAN

the witness on the stand at the time of adjournment, having been heretofore duly sworn, was examined and testified further as follows:

The Court: You have been sworn.

On Exhibit BR, under the column on cans, appear the words Total Account 430; that is an account number of Winckler & Smith?

The Witness: Yes.

The Court: And the figure there after that is 9/30, '51, and then a figure of 71,545.89. Did you check and find that figure in the books of Winckler & Smith?

The Witness: Yes.

The Court: And the one below is Less Account 430, 8/31, '51, 61,800.33. Did you find that figure?

The Witness: Yes, sir.

The Court: Did you find, also, this item Total Charge This Month $8,053.20? [2956]

The Witness: No, sir.

The Court: The same would be true with the column under Cartons, did you find Account 431 and those entries?

The Witness: That is correct.

The Court: But did not find the total charge this month?

The Witness: That is right.

The Court: What would be your explanation that you found no corresponding figure to the total charge this month?

The Witness: Immediately above that total

(Testimony of Francis A. Regan.)

charge figure is a variance of an amount entitled some sort of variance. That figure I could not find in the books, and that is included in the total figure. The total figure, as I recall, includes the change in the account balance, plus or minus that variance figure.

The Court: Do you know what that variance figure is?

The Witness: No, sir.

The Court: You don't know what it means?

The Witness: No.

The Court: You couldn't figure it out?

The Witness: It didn't enter into my computations.

The Court: You couldn't fit it in?

The Witness: I made no specific attempt to. I couldn't find it in the books.

The Court: It is the difference between what is called Total Standard Cost, the 8,841.64, and the item called Charge [2957] This Month, is it not?

The Witness: I would have to look at that. I believe it is.

Mr. Strachan: Do you have the books here?

The Witness: I may have a copy of that specific one.

The Court: It can't be that, either.

The Witness: As I recall, that is not the difference, your Honor.

Then, in addition to checking those balances, I did examine purchase invoices, and did locate and tie in the unit figures appearing under Cans and

(Testimony of Francis A. Regan.)

Cartons, not in all cases for all sizes, but in some cases, to the figure appearing on there, to the extent that I believed that at the time that check was necessary—was satisfactory in order for me to use that in my analysis.

The Court: That is all that you were able to identify as far as matters in books?

The Witness: Could I look at that again, sir?

The Court: Yes. I am looking particularly at some other account numbers shown below.

The Witness: On this particular one, your Honor, which is September, 1951, the figures down here are obliterated, but I believe in other months those totals may appear, and I feel reasonably sure that I would find the corresponding figures tied into the books. [2958]

The Court: You weren't able to take any of these figures and reconstruct them and find them in the books, like Less 432 Account, it looks like 9824.69?

The Witness: On this particular one I did not, but on others I have.

The Court: How many of these summary sheets are you going to use?

Mr. Strachan: We have March through November.

We had intended only to use this one.

The Court: In checking for the use of this one you made similar checks on others to tie in, for instance, items such as at the bottom 432 and 390-1, and so forth?

(Testimony of Francis A. Regan.)

The Witness: Yes, sir.

The Court: And although the figures here were mixed up a bit on others, you could make a check?

The Witness: On others I could. I didn't check all of them, your Honor, but to the extent that I felt I established a relationship between that and the general books of the company.

The Court: I think sufficient foundation, in view of all the facts, can be laid for this document. I think the thing that satisfies me is the tie-in with some figures in the books.

If you tie in at least one, it would indicate that there was some tie-in with the books, and that this, therefore, was some kind of a cost analysis that had some relationship to the [2959] books.

The matter of weight is a matter of cross-examination and all that. But that satisfies my concern, and upon some foundation being laid in front of the jury, unless something else develops, I will probably admit BR.

Mr. Strachan: I don't think, for my purposes, that I need do anything before the jury. If it is agreeable to your Honor, and not objectionable to Mr. Dixon, I would just as soon offer it in evidence at this point.

The Court: And then let Mr. Dixon cross-examine?

Mr. Strachan: That is right. I don't think it has any particular jury importance.

The Court: All right. Then BR will be admitted.

The objection is overruled, and it is subject to cross-examination by the plaintiff.

* * *

Mr. Dixon: Your Honor, I would like you to understand that my two exhibits that I offered yesterday are not yet in evidence. [2960]

The Court: Exhibits 79 and 80, ruling was reserved. Do you again offer them?

Mr. Dixon: Yes, I do, your Honor.

The Court: During the time Mr. Lynch was on the stand you asked that ruling be reserved pending redirect, and we finished with Lynch. He now again offers them, 79 and 80.

Mr. Dixon: Yes.

Mr. Strachan: I object to them as being irrelevant and immaterial, and they shouldn't be admitted because they weren't disclosed to us prior to the time they were identified here. [2961]

The Court: Well, if there is any merit to that objection, that comes under the heading of impeachment, and impeaching documents are always treated in a different category. The objection is overruled.

Exhibits 79 and 80 are received in evidence.

The Clerk: Plaintiff's Exhibits 79 and 80 in evidence.

(The exhibits referred to were marked Plaintiff's Exhibits 79 and 80 and received in evidence.)

The Court: Now, the next matter you wanted to take up?

Mr. Strachan: I would like to discuss Exhibit CB and tell you what we did, tried to do in that exhibit. In our discussions yesterday and also last Friday, your Honor indicated that we would be permitted to put in an exhibit for the purpose of rebutting Mr. Hodge and Exhibit 69. I have had the witness already testify as to what differences there were between his method of computation and Hodge's.

On Exhibit CB we set up three columns showing the items as taken from Exhibit 69, the adjustments by our accountants, as showing the amounts of adjustments, and in the third column we have combined or consolidated Exhibit 69 with the adjustments to show the exhibit as adjusted.

The Court: And you don't have in CB anything about oil?

Mr. Strachan: There is nothing in CB about oil.

The Court: Then I would say your CB complies with my requirements and it is subject to cross-examination. You [2962] covered these figures, some of them, in fact most of them have been covered, I guess all of them have been covered in the record.

For example, Winckler & Smith selling expense, 87,000, comes from 69. The 22,000 comes from 69. Your excess G and A, 37,000, comes from 69. Your $19,000 figure was testified to by Hodge, and the 37,000 figure by Hodge. He testified also to the $10,000 figure. I don't mean Hodge. I mean Lynch. Those that are under adjustment.

Mr. Strachan: We would like to have Mr. Regan

explain that to your Honor and Mr. Dixon, because it is a new figure.

The Court: Where did the $10,144.46 come from?

Witness Regan: That is an item that——

Mr. Dixon: What item are we talking about? We just got these, your Honor.

The Court: Under the adjusted column, J. A. Lynch, down to before the sub-total figure. Gross Loss on Actual Operations per Exhibit 65 not included by Hodge, $10,000.

Witness Regan: That item for the gross loss on actual operations of the company for the year ended January 31, 1952, is identified as such on Exhibit 65. That item had not been included in Hodge's computation.

The Court: Well, it is in the record because it appears in 65?

Witness Regan: It is in the record on 65. [2963]

The Court: All right.

Witness Regan: However, the reason that is put in here is from the accounting viewpoint these adjustments are now handled as if 69 was the consolidated income for the year ended January 31, 1952, covering the actual operations and in addition the additional 12,000 tons.

Now, in developing that interpretation of 69, I recall specifically that the costs as appearing in Exhibit 65 were traced into 69 by your Honor when you looked at the 93,000 appearing on 65 and traced it into 69, and you looked at the 87,000 and traced it into 69.

Your attention was not called to the $10,000 that had not been taken in. This computation carries that over.

The Court: All right. Now, also, this is an analysis, as 69 was, as to what would be the final result, profit or loss, if 12,000 tons was added to what had already been done.

Witness Regan: Yes, sir.

The Court: In other words, it was not just what did happen with 12,000 tons alone, but what would have happened with 12,000 tons added to what Winckler & Smith had.

Witness Regan: That is down to the figure in the third column——

Mr. Dixon: Where is that? Oh, I see, the third column.

Witness Regan: That's right. The computation at the end represents the actual loss if the year taken into effect [2964] was one which stopped at Hodge's computation at $25,000 on over-all operations with the profit what would result only on the 12,000.

So the computation down through the $254,900.01 is the consolidated return or computation of income, and the last computation at the bottom then traces that back to the 12,000 only.

The Court: Well, you mean it is to the effect of 12,000 tons upon the gross operations? In other words, you have a comparable figure to Hodge's figure of $209,000 of what profit that would have resulted from the combined operations. I take it your figure is the comparable figure?

Witness Regan: Yes, sir.

The Court: Your conclusion is that there would have been a loss of 28,000?

Mr. Strachan: No, it would have increased the loss.

Witness Regan: There would have been a loss of 28,000 on the 12,000 tons, and on the over-all operations there would have been $212,829.03. That is the $184,000 loss plus the other.

The Court: All right. I see what you have in mind.

Mr. Strachan: As to that exhibit, your Honor, I would like to have the witness explain how it was prepared, with copies before the jury, and have him explain just as briefly as your Honor explained it as you ran down it. [2965]

The Court: I think that is proper. This exhibit is aimed at combating 69 and complies with what I have suggested. Do you propose also——

Mr. Strachan: I would like also on that to have the witness state, unless it is ruled improper, I would have him state that in this exhibit there is no account taken of the oil and peel.

The Court: Period.

Mr. Strachan: Sir?

The Court: Period. No account taken of oil and peel, period.

Mr. Strachan: Period.

The Court: That's all right. What do you want to do with CD and CC?

Mr. Strachan: All right. I will tell you about

CC. That takes the computation in BS but eliminates therefrom the portion of the computation which relates to oil and peel.

The Court: Well, now, what is this? Another exhibit in connection with 69?

Mr. Strachan: Well, that is what it is conceived as being, your Honor, because in our discussions yesterday your Honor said that Exhibit 69 had nothing to do with oil or peel, and that was the portion of it that you thought was improper as to——

The Court: I think that CC complies with what I have [2966] been talking about, but now the question is, how many of these exhibits, how many different computations are you going to make?

Mr. Strachan: Those are the only two that do not relate to the oil and the peel component of the TreeSweet contract.

After these, I will try to qualify and would offer in evidence BF as showing computations which he made for the purpose of determining what the fact would be if you took into account return on oil and peel under the TreeSweet contract.

Then I would offer BT as showing how that computation would be combined with the results of actual operations for the year ended January 31, 1952.

The Court: Then what next? CD?

Mr. Strachan: Then I would go to CD.

The Court: What is it supposed to be?

Mr. Strachan: Well, that is a computation showing sales, less cost of sales, including both the juice

and the oil components, and giving credits that come out of the same figure as BS except for the item of additional G and A.

The Court: Does it add anything to what you have in BS and BT? It is on the same basis, taking into account oil?

Mr. Strachan: If I can have just a minute with co-counsel, perhaps we can eliminate one or the other, your Honor.

The Court: I don't know if it makes any difference if [2967] I am still of the same mind. I will probably sustain an objection to BS and BT and CD because they are all based on oil.

Mr. Strachan: Yes. Well, we think it is important to get before the jury the fact, which is a fact, that there was a $25 return under the TreeSweet contract.

The Court: You can bring that in, but I am pointing out that in logic it doesn't have anything to do with the getting of the 12,000 tons—well, doesn't have anything to do with Exhibit 69. It might have a bearing on whether or not Winckler & Smith would have gotten the 12,000 tons.

Now, Mr. Dixon made an objection the other night that I hadn't considered. Have you given any thought to that?

Mr. Strachan: I don't recall it.

The Court: Namely, his contention that from the standpoint of whether Winckler & Smith's oil processing was less efficient than TreeSweet, you can't rely on that for justification of a refusal to

give Winckler & Smith the comparable contract unless you have proof in the record that Sunkist knew about that situation.

Mr. Strachan: There will be proof in the record as to that. But quite apart from that, your Honor, it seems to me that when we are making computations as to whether Winckler & Smith, had they operated under the terms of the TreeSweet contract, would have made a profit or loss, we should be [2968] allowed to show that if they were to have what they call comparable terms, that they wouldn't have had the fruit necessary to produce the juice for $171,000 as compared with the three hundred and some thousand dollars that TreeSweet had to pay.

If they are going to take the gain, they ought to take the cost of the gain.

The Court: I still think you have slipped a cog on that logic, because TreeSweet made the oil and turned the oil over to Sunkist. The return from the increased efficiency of TreeSweet benefited Sunkist.

Now, on a comparable contract, Winckler & Smith would take the fruit, and make the oil, and there would be less return to Sunkist. But that hasn't anything to do with what Winckler & Smith would have made. It may have a bearing, if it is admissible, on whether Sunkist would have given Winckler & Smith the contract.

Mr. Strachan: I think it also has a bearing on whether Winckler & Smith would have made a profit. If they had paid for the oranges the same that TreeSweet did, they would have paid 300,000.

The Court: Wait a minute. You talk about paying. They didn't pay that. They turned the oil over.

Mr. Strachan: All right.

The Court: It is what Sunkist received. [2969]

Mr. Strachan: Then the transaction would have been handled so that, to use the language of the Exhibit 67, there would have been obtained from the oil and peel returned by the processor——

The Court: There would have been obtained by Sunkist additional money.

Mr. Strachan: From the processor. Now, it seems to me if you are going to compare this, you have to compare the whole contract and not allow, as was done in Exhibit 69, the assumption that the only cost of fruit and the only return to Sunkist would be the 170,000 or $171,000, because that is entirely and radically different.

The Court: Now, Mr. Strachan, there are two different comparisons and you mix them up. This thing is complicated enough with this jury without further mixing it up.

To go back over it again, Exhibits 66 and 67 were summaries of what Sunkist got from TreeSweet and Silzle, what Sunkist got. Plaintiff then says Sunkist would have got from us $40 a ton. Exhibits 66 and 67 show what Sunkist got from Silzle and TreeSweet. Therefore, the oil became material because Sunkist got the oil.

Therefore, what you are talking about is a rebuttal to 66 and 67.

69 proceeds on the other basis, what would Winckler & Smith have made, you say, under a comparable

contract? A [2970] comparable contract is to turn the oil back to Sunkist. Therefore, what Sunkist got on that deal is not the comparison. You have got a proper matter of comparison with 66 and 67, but not with 69.

Mr. Strachan: Apparently I am not convincing your Honor.

The Court: No.

Mr. Strachan: So I will just summarize——

The Court: You have two alternatives.

Mr. Strachan: I will just summarize my position in this way, if I may.

69 is based upon the assumption adopted by the plaintiff. That assumption is that the only cost of fruit under the TreeSweet contract, had Winckler & Smith had it, would have been approximately 171,000 attributable to juice, and not attributable to any oil, nor does it contemplate that any oil would have been returned. [2971]

The Court: All right. Now, wait——

Mr. Strachan (Continuing): That is their theory.

Now, our theory is that if they were to have processed under the same terms as TreeSweet did, the total obtained from the processor would be not only the 171,000 for juice, but 130,000 for peel, and that, therefore, you should charge as a part of the cost of sales, on the hypothetical processing of the 12,000 tons, $300,000 instead of $171,000.

The Court: The fallacy was never clearer than in your statement right there. You started out by

the cost to certain people, and then you switched over to the amount obtained from the processor. The fallacy is inherent right in your statement.

Secondly, you have already been told that it will be permissible to show what Winckler & Smith got from the oil, what they made from the oil that they get from the peel.

They were paid so much for processing it, there was so much oil involved; if that means so many dollars and cents to Winckler & Smith, you can show that. I am not saying that you can't show the oil at all. But you can't show, as part of 69, or in rebuttal to 69, what Sunkist would have got for the oil.

Mr. Strachan: I divorce Exhibit CD completely from rebuttal. It is our own computation. It is based upon the assumption and contradicts the allegation that if fruit had been [2972] available to Winckler-Smith at a comparable price, a profit would have been made. Because CD, in essence, is a computation showing whether there would have been a gain or loss to Winckler & Smith had Winckler & Smith obtained fruit on precisely the same terms as TreeSweet did, namely, $25.10 a ton.

The Court: CD says at the top Statement of Projected Results of Operation.

Then you come down to the bottom and you show Actual Loss and Additional Loss, which I suppose you mean to Winckler & Smith. Is that what you mean, to Winckler & Smith?

Mr. Strachan: Yes.

The Court: You can do one of two things with BS, BT and CD. You can lay your foundation outside the presence of the jury, which might be preferable. Or if you do it in the presence of the jury, in view of what I indicated I am going to rule, I will probably have to tell the jury why I am sustaining the objection to your exhibits.

Mr. Strachan: I think I would prefer to do it in the presence of the jury.

I don't think I will handle the thing in a manner that will be in any way objectionable.

The Court: I don't intend to make any big speech about it, but I don't want the jury to think that I intend to be arbitrary with you, even if you think I am. [2973]

Mr. Strachan: I just suggest that it is a matter on which there are differences of opinion.

The Court: On which we disagree.

Mr. Dixon: I hate to add anything to this already extended discussion on this matter, your Honor, which we have been over several times, but I wish to point out something that hasn't yet been mentioned. That in Mr. Hodge's exhibit and his testimony there was no reference whatever, and he did not take into consideration any profit which might have been made by Winckler & Smith in processing the oil, because that is a de minimus factor, anyhow.

The Court: All right. The point is this——

Mr. Dixon: It is not in the estimate.

The Court: The defendants aren't estopped

from making what they think is a correct calculation.

Mr. Dixon: No.

The Court: The only thing we have run up against and we are not going to talk any more about it after this, is this: I don't want a comparison made which has a basic defect of logic in the comparison.

That is just not fair to a jury.

I concede that counsel are in good faith, understand this. If I didn't think they were in good faith on it, it would be a different story.

Mr. Strachan: I wouldn't be in the court [2974] room.

The Court: I concede you are in good faith, but in my opinion there is a defect of logic in that comparison; therefore, in my right to conduct the trial I feel that it should not go in as a comparison with 69.

We have been over all that.

But the defendants aren't estopped from showing that your computations weren't correct, as long as what they compute, in logic, has a bearing upon the computations you made, Mr. Plaintiff, or Mr. Dixon.

Mr. Strachan: May I ask just one further question?

Would it make any difference in your Honor's thinking or ruling if in laying the groundwork for CD I would have my witness testify that he had made a computation of the profit or loss that

Winckler & Smith would have had if they had obtained fruit and paid or returned to——

The Court: There is your trouble. You say "paid," and that is one thing; but when you say "returned to Sunkist," then you are off again.

Mr. Strachan: If they had obtained fruit which yielded to Sunkist from the processing contract $25.10 per ton?

The Court: That is the same problem. We are right back here where we were the other day when we had the tangle on 69 to start with. I injected myself into the thing because I felt that you didn't understand, or I didn't know at the time, were not trying to understand what the [2975] plaintiff had done, so we got off into something which created a lot of record here and we spent a lot of time on it.

We finally came to an agreement as to what the theory of 69 was.

But I had the same problem then of trying to keep the trial on a basis of, on a cross-examination of 69, of what it purported to be and not what somebody else thought it was.

* * *

The Court: The record will show the jury present in their proper places.

In your absence, Exhibit BR has been received in evidence. You haven't heard anything about it, but it is a sheet headed at the top Winckler & Smith Citrus Products Cost Analysis, Month of September, 1951.

Also, there has been received in evidence the two

exhibits Mr. Dixon cross-examined on yesterday. The voucher [2976] and the bill from the Southern California Gas Company, and the check for $21.33, Exhibit 80; and a copy of the check and voucher attached, Exhibit 79, the payment of $340 to N. J. Winckler for parking, telephone, car expense, for the months of April and May.

Proceed.

FRANCIS A. REGAN

a witness by and on behalf of the defendants, having been heretofore duly sworn, was examined and testified further as follows:

Direct Examination
(Resumed)

By Mr. Strachan:

Q. Mr. Regan, was Exhibit BR, entitled Cost Analysis Month of September, 1951, one of the documents that you referred to in making your adjustment of computation of costs for cans, cartons and labels?

A. It was, sir. I don't have a copy on the stand with me at the present time. I have one now.

Q. That is one of the documents that you referred to in your testimony as being the basis of your computation of cost of cans, cartons and labels for the year 1951?

A. It is part of the basis for that computation, yes. [2977]

Mr. Strachan: I have had marked and would like to have distributed to the jury copies of Exhibit CB.

(Testimony of Francis A. Regan.)

The Court: They may be distributed to the jury.

This is another one of these exhibits that is illustrative of testimony, such as Exhibit 69.

You recall that Exhibit 69 was some computations Mr. Hodge made about the mythical 12,000 tons. Now, Mr. Lynch testified yesterday as to certain matters of expense, according to his computation, and this is the defendants' exhibit for the same purpose as 69.

Again, the exhibit itself, when received in evidence, will not be evidence in itself, but will be illustrative of the testimony of the witness and of matters and figures appearing somewhere in the record.

All the figures, I think, have been identified with the possible exception of one figure.

Mr. Strachan: Yes.

The Court: All right.

Q. (By Mr. Strachan): Mr. Regan, was Exhibit CB prepared by you and under your direction and supervision? A. It was, sir.

Q. Will you explain briefly the manner in which it was prepared and what is meant by each of the three columns?

The Court: The first column is your summary of Exhibit 69, the second column are adjustments that you made, and the [2978] third column are the results that you would get?

The Witness: That is correct, sir.

Q. (By Mr. Strachan): Now, will you just recall your testimony as to what these adjusting items

(Testimony of Francis A. Regan.)

were and tell us briefly about the items under the column Adjustments by John A. Lynch & Company?

A. The adjustments in the adjustment column, the first addition, which is to the sales figure, in the amount of $2,870.30, results from having computed the sales price of the product related to the 12,000 tons in the sizes, in the can sizes and cases that the product was delivered.

The Court: Would have been delivered.

The Witness: Would have been delivered, yes.

The difference between the figure that I have computed and that appearing in Exhibit 69 makes up my adjustment.

Generally, the figures that I would use for sales would average approximately $62.74 a ton as set out in Exhibit 67.

The next adjustment appearing on CB relates to the adjustment of the cost of processing, where I found during the course of my examination that the costs on 69, which were on the 1949 levels, were lower than the costs that would have been incurred in the year 1951.

Q. (By Mr. Strachan): Your study of costs of 1951 resulted in an adjustment above the costs used in Exhibit 69 of $10.93 per ton, is that [2979 correct? A. That is correct.

Q. And gave you, instead of a processing cost of $35.57, as used in 69, a processing cost of $44.99 on the 1951 basis.

(Testimony of Francis A. Regan.)

A. A slight correction. It is an increase from $34.06 to $44.99.

Mr. Dixon: Are you talking about CB?

The Witness: CB. The line entitled Winckler & Smith Processing Cost.

The Court: All right.

Then your next line across there is your computation of, instead of Hodge's figure of $1.51 profit a ton, you wind up with $9.42 loss?

The Witness: That is correct.

The Court: Then the next is your totals?

The Witness: The next is the projection of the $9.42 a ton to a 12,000 ton capacity.

The Court: The matters of allowance, labels, advertising and discount, the adjustment there is based upon the fact of your larger figure of 752,000?

The Witness: In part that is true. The other cause for that would be what I believe would be the correct allocation of the yield of the 12,000 tons to particular can and case sizes. Some of the allowance was based on can size or case size. [2980]

The Court: Anyhow, those are your adjustments there.

Then the next line is your totals?

The Witness: That is correct.

The Court: Go ahead, Mr. Strachan.

Q. (By Mr. Strachan): Will you proceed with the next adjustment? I think you made no adjustments in the——

The Court: In the first three items.

(Testimony of Francis A. Regan.)

Q. (By Mr. Strachan): ——first three items. Then explain the next four adjustments you made.

A. The next adjustment I made concerned the actual general and administrative expense for 1952, which was not included in Mr. Hodge's computation.

The Court: That is what you testified about yesterday?

The Witness: As I testified to yesterday.

The Court: The $19,000 figure is the figure you arrived at yesterday?

The Witness: That is correct.

The Court: And the $37,000 figure you testified to yesterday?

The Witness: That is correct, sir. That is the figure that was necessary to bring the sales expense up to what I considered proper sales expense that would have been incurred on the additional volume.

The Court: And skipping the 10,000 figure for a minute, the 40,000 figure is the one you testified to yesterday? [2981]

The Witness: That is correct.

The Court: Increase in adminstrative expense according to your computations?

The Witness: That is correct.

The Court: I don't think you testified about the $10,000 figure.

The Witness: The $10,144.46 adjustment is the amount of the actual gross loss on operations experienced by Winckler & Smith in the year ending January 31, 1952. That loss was related to the 8,000

(Testimony of Francis A. Regan.)

tons that the company actually processed. That loss was not included in Mr. Hodge's computation in computing the over-all loss for the company on the basis that the 8,000 tons that had been processed was processed, and in addition the 12,000 tons would be processed.

This loss was already incurred and should be in the computation, and for that reason I have so included it.

The Court: The next line, the first figure one forty-seven is from Hodge's Exhibit 69, the next is your adjustments, and the next is total?

The Witness: That is correct, sir.

The Court: The results that you get?

The Witness: The figures that your Honor just read are the total of the items to be deducted in the respective columns from the previous total of profits and allowances. These are the costs that are being deducted from what might be called the gross profit. [2982]

The Court: Now, explain your last figures on the page.

Mr. Strachan: I would like to have him explain what the $212,829.03 figure represents.

A. The line in which that figure appears contains in the first column the net result from over-all operations as computed by Mr. Hodge.

The second column carries the total of the amount that my adjustments would affect the total that Mr. Hodge had used, and the figure of $212,829.03 represents my computed loss that would result from the

(Testimony of Francis A. Regan.)

8,000 tons that had been actually processed, plus the additional 12,000 tons, under the terms of the Tree-Sweet contract as interpreted in Exhibit 69.

Q. (By Mr. Strachan): So that according to your computation the total loss for the year would have been greater with the added 12,000 tons than occurred with the 8,000 tons alone?

A. That is correct. My computation resulted in determining that the loss of $184,523.20 would have been increased by the amount of $28,305.83 to an over-all loss of $212,829.03.

Q. Now, none of the computations dealt with in this exhibit reflect any effect which the return of oil and peel to Sunkist might have had?

A. That is correct, sir.

Q. That is not accounted for at all in any of these [2983] figures? A. No, sir.

Mr. Strachan: I will offer Exhibit CB in evidence.

The Court: CB received in evidence.

* * *

The Court: Distribute CC.

On Exhibit CC, all the figures there appear somewhere in the record in the defense or plaintiff's testimony or exhibits, except the actual computations, right?

The Witness: That is correct, sir.

Q. (By Mr. Strachan): Was Exhibit CC prepared by you and under your direction and supervision, and is it based upon your examination and

(Testimony of Francis A. Regan.)

interpretation of the books and records of account of Winckler-Smith?

A. Yes, sir. That is Exhibit CC?

Q. Yes, sir. A. Yes, sir.

Q. I would like to have you describe briefly the manner in which you prepared it and the source of data, and explain to what extent it differs from the comparative computation which you made in Exhibit CB. [2984]

A. The method of obtaining the sales figures and the costs appearing in Exhibit CB——

The Court: CC?

The Witness: CB, were identical with the computations appearing in CC. The sales figures were obtained by analyzing the yield on the mythical 12,000 tons, projecting that yield in the proper case and can sizes, and applying the proper sales figure to each group.

Under the cost of sales the figures included therein were obtained from analyzing the results that would be obtained under the TreeSweet contract insofar as they apply to the mythical 12,000 tons, determining the allowances that would be allowed or paid, deducting those allowances or payments from the amount to be accounted for, and then extending the balance as the cost of the juice portion of that contract.

The processing costs were those costs computed the same as in Exhibit CB on the 1951 price levels.

The total cost of sales represents the cost of the juice portion of the product, and the cost of producing the juice.

(Testimony of Francis A. Regan.)

Deducting that figure from the sales figure, I arrive at a gross profit on the juice portion of the contract, and then I deducted from that the sales expense that I had computed in the same manner as on CB, and general and adminstrative expenses, and arrived at a net loss which applies only to the 12,000 tons. [2985]

At the bottom of the page that loss is added to the actual loss that had been experienced by the company, resulting in a total figure that would cover the actual loss, plus the additional loss that would result from processing the juice portion of the TreeSweet contract on a 12,000 ton basis.

Q. Now, will you explain briefly what the difference in method was as between CD and CC which resulted in your having somewhat different figures there?

A. The figures are identical until the computation is made at the bottom of the page on Exhibit CB.

Nowhere in CB has Mr. Hodge or myself included an item of about six thousand odd dollars of miscellaneous income for the year that the company actually received. That was not included in Mr. Hodge's computation and I did not inject into mine. The difference between the 28,000 and the 21,000 would be the amount.

Q. Now, in Exhibit CC, you have not taken into account any effect which there might have been from a return of oil and peel to the supplier of the fruit processed, is that correct?

(Testimony of Francis A. Regan.)

A. That is correct, sir.

Mr. Strachan: I will offer Exhibit CC in evidence.

The Court: CC received in evidence. [2986]

* * *

Q. (By Mr. Strachan): Mr. Regan, did you make a computation to determine the projected results of processing 12,000 tons of Valencia oranges under the TreeSweet contract terms in which you did make an allowance for the fact that oil and peel to the value of about $10 a ton was returned to Sunkist? A. I did.

The Court: That is Exhibit BS for identification, right?

The Witness: Yes, sir, that is one of them, I believe.

The Court: Well, let's talk about BS.

Q. (By Mr. Strachan): BS is the result of that computation, is that right?

A. That's right, sir.

Q. Now, will you tell us in what manner you proceeded to make that computation?

The Court: Just a minute.

Mr. Dixon: If the court please, I object.

The Court: Just a minute.

Mr. Dixon: All right.

The Court: Let me ask the witness. In that computation you took a figure which would represent the return to EOP for the oil and peel under the TreeSweet contract?

(Testimony of Francis A. Regan.)

The Witness: Yes, sir.

The Court: And took another figure which would represent [2987] return from Winckler & Smith, correct?

The Witness: The amount returnable by them, yes, sir.

The Court: Under the TreeSweet contract the oil was returnable to Sunkist upon payment of a processing cost to TreeSweet?

The Witness: That is correct, sir.

The Court: The oil belonged to EOP?

The Witness: That's right, sir.

The Court: In BS you were also directing these computations as to oil in making comparison of what Winckler & Smith would have made with the 12,000 additional tons?

The Witness: That's right, sir.

The Court: The other computations in BS are similar to the exhibits that are already in evidence, CC and CB.

The Witness: The other computations are similar, yes.

The Court: You offer BS?

Mr. Strachan: I would have laid a somewhat more detailed foundation, but if there is no objection to the lack of foundation, I will offer it on the basis of your Honor's examination.

The Court: Objection?

Mr. Dixon: Objection on the grounds previously stated in the record.

(Testimony of Francis A. Regan.)

The Court: The objection is sustained to BS.

The reason that this is being sustained, ladies and gentlemen, [2988] is simply this. On Exhibits 66 and 67, the plaintiff was making a comparison from plaintiff's standpoint of what EOP or Sunkist would have got from their oranges under, in one case the Silzle contract and in the other case the TreeSweet contract, and was comparing that with the $40 a ton figure which we talked about. So when they were making a comparison of what Sunkist or EOP would get in those two exhibits, there was computed not only what EOP or Sunkist would get from the juice, but what EOP would get from the oil, because the oil was returnable to EOP under those contracts. Therefore, the oil figure was included within those computations in comparing what Sunkist or EOP would have received from TreeSweet or Silzle on a per ton basis for product oranges, including both the juice and the oil which went back to EOP.

Here the comparison in BS is attempted to be made on the basis of what Winckler & Smith would have made from processing 12,000 tons under a comparable contract.

Mr. Strachan: Would have lost, I think is a better term, your Honor.

The Court: Defendant says would have lost and plaintiff says would have made. I should say 69, plaintiffs' exhibit, and BS, which is defendants' exhibit.

(Testimony of Francis A. Regan.)

The question is, what would Winckler & Smith have made?

Therefore, since Winckler & Smith was returning the oil [2989] to EOP under this mythical 12,000 tons, Winckler & Smith did not make anything out of the oil except what they might have been paid for processing and, therefore, what EOP might have made from the oil is not properly a part of a comparison of what Winckler & Smith might have made.

In other words, both Exhibit 69 and Exhibit BS, as well as Exhibits CB and CC, which we have just received in evidence, were calculations as to what Winckler & Smith would have made or lost from processing 12,000 additional tons. Therefore, what Sunkist or EOP might have got for the oil which was returned to them hasn't anything to do with what Winckler & Smith would have made or lost.

Accordingly, the objection is sustained to BS.

Q. (By Mr. Strachan): I will ask you to refer to the document marked BT and ask you whether that was prepared by you and under your direction and supervision? A. It was.

Mr. Dixon: What is that, BT?

Mr. Strachan: BT.

Q. Will you tell us in what manner you prepared BT, without going into figures?

A. BT is a consolidation of the results that I obtained through my calculations on BS.

The Court: You based your calculations in BT upon BS, right, in part? [2990]

(Testimony of Francis A. Regan.)

The Witness: In part.

The Court: And you took a figure from BS which represented this oil returned to EOP, which we have been talking about?

The Witness: Yes, I did, sir.

The Court: And the other figures you took were figures from either Exhibit 65 or other parts of the record?

The Witness: They appear on 65. That is the first column. That is all as appears in 65 to the extent that the computation goes. That is down to the—well, the full exhibit 65, yes, sir.

The Court: Do you offer BT?

Mr. Strachan: Yes, sir, on the assumption that there is no objection for lack of foundation.

The Court: No objection for lack of foundation. By foundation, you mean in describing what it is and stating the figures, and so forth?

Mr. Strachan: That's right. I would have gone into some more detail.

Mr. Dixon: Same objection as before.

The Court: Same objection as discussed out of the presence of the jury.

Mr. Dixon: Same objection.

The Court: BT, the objection is sustained for the same reason that BS was sustained.

Q. (By Mr. Strachan): Mr. Regan, did you make a computation [2991] to determine whether Winckler & Smith would have had a loss from processing the 12,000 tons of Valencia oranges under the TreeSweet contract terms, assuming that

(Testimony of Francis A. Regan.)

Winckler & Smith would have paid in cash and returned in peel and oil approximately $25.10 a ton, which is the amount shown on Exhibit 67 to have been returned by TreeSweet? A. I did.

Q. Is Exhibit CD the computation which you made? A. It is.

Q. Will you describe that computation?

A. That computation starts off with sales figures identical with that appearing on the exhibits that I just testified to, computed in the same manner.

Under the cost of sales, I included two figures, one representing a cost for the juice portion of the contract, and one representing the cost of the oil and peel portion of the contract.

Q. At what rate did you use the return on the juice realization per ton?

A. That was figured at $14.24 per ton.

Q. And on the oil and peel realization, what figure did you use?

A. Approximately $10.81 a ton.

The Court: Well, let me ask again. This Exhibit CD is what you are talking about, for [2992] identification?

The Witness: Yes, sir.

The Court: It says Statement of Projected Results of Operations by Winckler & Smith on Processing 12,000 Tons of Valencia Oranges under the TreeSweet Contract Terms, right?

The Witness: Yes, sir.

The Court: Then your final figure on the sheet is

(Testimony of Francis A. Regan.)

the figure which you would say would be the actual additional loss to Winckler & Smith on the computations you have made?

The Witness: Yes, sir.

The Court: And in this exhibit, also, you have taken into account the matter of the return to EOP on the oil which would have to be delivered to them under the TreeSweet contract?

The Witness: Yes, sir, but in a manner, a different viewpoint to the ones to which we have previously testified.

The Court: You have the same figure of 744,000 that is found in Exhibit BS and found in Exhibit BT?

The Witness: The figures would be generally identical. It is the viewpoint that was placed on it by the question that was given to me.

The Court: But you were computing Winckler & Smith's loss on 12,000 tons?

The Witness: That is correct, sir.

The Court: Do you offer it? [2993]

Mr. Strachan: Well, I would like to have him describe the process, how these various elements entered into it, your Honor, as part of the foundation before I offer it, without figures, just tell what was done. I think he has told how he——

The Court: Well, I am content with my record on this. I will ask you another question. You took into account the juice realization, right?

The Witness: Yes, sir.

(Testimony of Francis A. Regan.)

The Court: Then you had figures which had as their basis the oil and peel return to EOP——

The Witness: By——

The Court: ——by Winckler & Smith.

The Witness: That is part of the computation, yes, sir.

The Court: In other words, under this contract Winckler & Smith would have had to give the oil and peel back to EOP, to whom it belonged?

The Witness: That is correct, sir.

The Court: There would have been some payment for the processing of it?

The Witness: That is correct, sir.

The Court: But the oil and peel would belong to EOP?

The Witness: That is correct, sir.

The Court: And your final figure in this computation is what Winckler & Smith would have made or lost with the [2994] additional 12,000 tons?

The Witness: That is correct, sir.

The Court: And in making that computation, you took into account what EOP or Sunkist would have got from the oil and peel returned?

The Witness: In part, sir.

The Court: All right. Same objection?

Mr. Dixon: Same objection.

The Court: As heretofore made out of the presence of the jury?

Mr. Dixon: Yes.

Mr. Strachan: I would like, your Honor, in order that the record may be clear, to show how

(Testimony of Francis A. Regan.)

the credits were utilized and how each item was arrived at, without going into actual figures.

The Court: The request is denied. Do you want to offer it?

Mr. Strachan: I will offer it.

The Court: Same objection heretofore made?

Mr. Dixon: Same objection, your Honor.

The Court: Same ruling. Objection sustained for the same reason the objection was sustained to BS and BT. [2995]

* * *

Cross-Examination

By Mr. Dixon:

Q. Mr, Regan, I believe you testified you were the one who made the study of the industry and of the processing operations of the plaintiff in this case during the years 1949, 1950 and 1951, with particular reference to the determination of the costs of operation, is that correct?

A. That is partially correct, sir.

Q. Well, you made a study, did you, I think you testified you made a study of the industry with particular reference to its application during these years to Winckler & Smith and its operations?

A. Not quite, sir. I believe I testified that wherever the occasion in my judgment arose where I felt I needed to supplement the information I did possess, that I would go out and make inquiries. I did not investigate or make inquiries of the industry as such. [2997]

(Testimony of Francis A. Regan.)

Q. In other words, you didn't make any effort to familiarize yourself with whether, for example, there was a greater supply of Valencias in '49, a lesser supply at a higher cost in '50, and what the market condition was with reference to Valencias in '51—I take it you didn't go into that at all?

A. Only insofar as those items would appear in the plaintiff's records.

Q. Would appear where?

A. In the plaintiff's records.

Q. So that your study, then, was limited entirely to a study of the plaintiff's records that were examined by you during the course of your investigation, is that right?

A. Generally, with few exceptions.

Q. When did you start this study?

A. Personally, myself?

Q. Yes.

A. Some time within June or July.

Q. June or July of last year?

A. June or July of 1955.

Q. It has been going on rather continuously since that time? A. Periodically since then.

Q. I think one of the statements you made was that in your study of the operations of the plaintiff during the years [2998] '49, '50 and '51, you noticed that there was a decided drop in the amount of Valencias that were processed by the plaintiff during those years. Is that a fair statement of your testimony in that respect?

A. My statement, as I recall, the statement that

(Testimony of Francis A. Regan.)

I made was an opinion based upon exhibits that had been offered.

Q. Now, can you answer my question, please?

A. I believe I did. I did make that statement.

Mr. Dixon: Will you repeat the question, Mr. Reporter?

The Court: He just now said he did make that statement.

Mr. Dixon: You did make that statement?

The Court: Answer the question first and then explain if you need to, Mr. Regan.

Q. (By Mr. Dixon): Your study showed that in 1949, that is the year ending July 31, 1950——

The Court: July or January?

Q. (By Mr. Dixon): The year ending January 31, 1950, that a substantial larger amount of Valencias was processed during that fiscal year by the plaintiff than in the fiscal year ending January 31, 1951; is that correct? A. That is correct.

Q. Did you examine the government figures on fruit available and the amount of juice, single-strength juice, processed in California during the years 1949 and 1950, that [2999] would be the years of the plaintiff, fiscal years of the plaintiff, ending January 31, '50, and January 31, 1951, to determine whether there was a drop, in fact, in 1951, in the amount of Valencias processed into single-strength juice in California? A. By the plaintiff, sir?

Q. I said in the industry.

A. You didn't say in the industry, as I recall.

(Testimony of Francis A. Regan.)

But I didn't make such a study and I had no information of that type.

Q. You don't want this jury to believe, then, from your statement, that you attribute this drop necessarily in Valencia production in '51 to a reduction in business, do you? A. No, sir.

Q. I just wanted to get that clear.

Mr. Regan, in 1951, did you make a study of the Sunkist selling prices of Valencia oranges in that year to determine whether there were any increases by Sunkist during that year of Valencias to independent processors?

A. In the calendar year of '51, sir?

Q. In the processing season in 1950. I am sorry if I used the term '51. A. No, sir, I did not.

Q. Well, it is a fact, is it not, that there were two increases after the opening price of Valencias by Sunkist, [3000] during the processing season of 1950, to independent processors, is it not?

A. Not having determined that, I wouldn't know whether that was a fact or not.

Q. In any event, you didn't inquire into that?

A. That is right, sir.

Q. I see. So that in your Exhibit BP, where you outline the purchases of fruit by the plaintiff, you are not suggesting, necessarily, that its production in Valencia juice in the year 1950 was proportionately less with reference to 1949 processing year than any other company in the industry?

A. No, sir.

The Court: If I understand that, your BP con-

(Testimony of Francis A. Regan.)

cerned the amount of fruit that the plaintiff processed?

The Witness: That is right, sir.

The Court: You did not make a study of what other processors processed?

The Witness: No, sir.

The Court: During the same year?

The Witness: No, sir. This exhibit relates only to the plaintiff.

Q. (By Mr. Dixon): Directing your attention to BQ, which purports to be an exhibit showing the purchases of raw fruit according to source of supply by the plaintiff, in the fiscal year of the plaintiff ending January 31, 1952, you [3001] have Morgan Ward 4354 tons. Do you recall that figure?

A. I do, sir.

Q. Is that the amount acquired by the plaintiff under the contract with Mr. Ward during that year whereby oranges were processed by the plaintiff into frozen concentrate juice?

A. 1700.90 tons are covered by that contract, sir.

Q. How many more tons were covered by that contract, if any, with reference to the school lunch program, whereby they were processed for Mr. Ward?

A. Well, as I understand it, that is not the same contract. There was a separate sale——

Q. I know it is a different contract, but have you computed, in determining your total, how that was allocated?

(Testimony of Francis A. Regan.)

A. Yes, sir. There was 1726 tons related to the school lunch program.

Q. So that exclusive of those two contracts what is the balance remaining of Valencias that were acquired from Morgan Ward during the fiscal year ending January 31, '52?

A. About 900 tons, in addition to the frozen contract, and in addition to the sale of fruit to the plaintiff in connection with the school lunch program.

Q. In your study and investigation of the operations of the plaintiff corporation, did you determine whether it processed and sold any single-strength Valencia juice in the [3002] fiscal year ending January 31, '52? A. I did, sir.

Q. And what did you find with reference to that type of operation by Winckler & Smith during the year ending January 31, 1952?

A. I found during the year ending January 31, 1952, the books show sales of single-strength juice in the month of August, I believe principally in August.

Q. I didn't ask you about sales yet. I asked you about whether you checked to determine whether they processed any, Mr. Regan.

A. Not being facetious, but if they sold it, they would have to produce it, sir.

Q. Were you sitting in this court room, and I guess you did hear of some purchases of a carload of single-strength juice?

(Testimony of Francis A. Regan.)

A. I don't recall specifically, but that could have been.

The Court: If you know. Did you investigate to see whether Winckler & Smith produced any single-strength Valencia juice?

Mr. Strachan: I am afraid Mr. Dixon has two things confused. He is talking about the purchases of single-strength juice. That was in September, as I recall it, and it was a purchase of canned [3003] juice.

The Court: I just want the witness to answer the question. If he doesn't know or didn't do it, all right.

Do you know whether Winckler & Smith produced any single-strength Valencia orange juice in 1951, the fiscal year ending January 31, 1952?

The Witness: It is my recollection that I did notice a small production.

I would like to verify the amount.

I paid no particualr attention at the time, but I recall some recollection of that. It would be a small portion.

Q. (By Mr. Dixon): In connection with your examination of the books, did you determine how much Valencia juice was sold by Winckler & Smith, apart from the Florida sales, in the year ending January 31, 1952? A. I did, sir.

Q And do you know whether that amount which you found as being sold was processed by the plaintiff, did you determine that?

A. Whether it was processed by the plaintiff?

(Testimony of Francis A. Regan.)

Q. Yes.

A. I paid no attention to that, sir. I didn't trace those sales through for that purpose.

Q. Then you can't answer my question in that respect? A. That is right.

Q. But you did make an exhaustive and extensive examination [3004] into the records of Winckler & Smith to determine how much it would cost them to process 12,000 tons, assuming it was made available to them, into single-strength juice, in the 1951 processing season, didn't you?

A. I did, sir.

Q. And in your examination of the cost records, if any, that you examined of Winckler & Smith during the processing season 1951, did you find anything that covered any costs on processing Valencia single-strength juice during that year?

A. I found costs that I interpreted would have existed whether they processed single-strength juice, or blends, or concentrates, yes, sir.

Q. You did take Defendants' BR into consideration in determining your cost, didn't you?

A. I did, sir.

Q. And do you know whether that exhibit which relates to cartons, cans and labels only would apply, necessarily, to Valencia juice?

A. I know they would, sir.

Q. What makes you say that you know it would?

A. Well, first, there are two bases for that statement. First, in allocating, using the cost figures set out on BR, there is no distinction made on this

(Testimony of Francis A. Regan.)

(Testimony of Francis A. Regan.)

record, when it was prepared, as to what product went into the particular sizes, whether it was blended juice, grapefruit juice, [3005] concentrates, whatever it was.

Secondly, we found among the invoices, among the vouchers of 1952, billings from the American Can Company to Winckler & Smith Citrus Products Company, which in a few cases identified the purchase of cans as being orange juice cans, and I believe single-strength orange juice cans. [3006]

* * *

Cross-Examination
(Continued)

By Mr. Dixon:

Q. Mr. Regan, I think you testified this morning that you made a complete examination and comparison of the cost records of Winckler & Smith for the years 1949, 1950 and 1951, that is correct, is it not?

A. It is.

Q. You testified this morning that based upon Exhibit BR you computed the cost of cans, labels and cartons for processing an additional 12,000 tons of Valencia oranges by Winckler & Smith in 1951, is that correct? A. Yes, sir.

Q. Will you tell the jury what the costs were, for example, of cans in Exhibit BR?

A. I do not have a copy of BR, sir. Oh, yes, I do. I believe this is the court's copy. I have it here. The cost of cans in which size, sir?

(Testimony of Francis A. Regan.)

Q. Well, let's take the 12/46's, that's what we have been talking about in this case. [3011]

A. The cost per case appearing on BR is $.7089.

Q. What was the cost per case of 12/46 cans in 1949?

A. That would be per Mr. Hodge's computation, I presume?

Q. No. I am asking you from your examination of the books and cost records of this company for 1949 what the cost of a case of 12/46 cans would be or was in 1949.

A. I believe it would be—I know it would be less than that, Mr. Dixon, but I don't have that figure of what the cost was in 1949. I used the 1951 cost.

Q. I understood you to tell the jury this morning you made a comparison of all of the items which went into your Exhibit CB by comparing those costs with the same cost records from Winckler & Smith for the year 1949.

A. I made a comparison——

Q. Did you make an examination of the cost records for cartons for the plaintiff during the year 1949?

The Court: Cartons?

The Witness: Cartons or cans?

Q. (By Mr. Dixon): Cans.

A. Well, I can answer the specific question on the 12/46's——

Q. Just answer my question. A. Yes, sir.

Q. All right. What was the cost as indicated

(Testimony of Francis A. Regan.)

from the records of Winckler & Smith for a case of cans of 12/46's [3012] in 1949?

A. I have to make a short computation and I can tell you.

Q. Do you have your work sheets there before you?

A. I do, sir. I do in part. I have the figure I can compute from.

Q. Is the figure you are going to give this jury the figure contained in the books of this company?

A. Yes, sir.

Q. Or is it your own computation?

A. No. This is in the books of the company, sir. [3013]

Q. All right. What was it?

A. I believe it is 68 cents, sir, according to my computation here. And that is based upon——

Q. Just a moment. I am asking you where this 68 cent figure appears in the records of the plaintiff corporation. Will you tell the jury where that figure appears in the books and records of this corporation?

A. It appears on a voucher and attached invoice from the American Can Company to Winckler & Smith Citrus Processing Company, I believe the date is September, 1949, which covers a purchase of 46 ounce cans at the rate of $56.71 per thousand.

Rapidly computing the unit cost and the cost per case of 12/46's, it would come approximately to 68 cents.

Q. Is that the only invoice that you examined

(Testimony of Francis A. Regan.)

from the books and records of this company in 1949 to determine the cost of cans in '49?

A. No, sir.

Q. What other invoices did you examine, and records? A. I have one in September——

Q. Just a moment before we leave that. Do you have in your work sheet the date of the invoice that you are referring to of 68 cents?

A. That would be in September, '49. The specific day of the month I don't have. [3014]

Q. Let's have it, please.

A. I don't have it.

Q. Didn't you make a record in your work sheets of the particular invoice that you examined on which you base this statement?

A. No, sir.

Q. You didn't? A. No, sir.

Q. You mean you have nothing in your work sheets to tell this jury from which you derived what specific invoice you examined for 1949 on which you base this 68 cents?

A. The only thing I can say——

Q. Can you answer that yes or no?

A. No, sir, I cannot answer that yes or no.

The only thing that I can say is that I examined an invoice from the American Can Company to the plaintiff in September, '49.

Q. I heard that, Mr. Regan.

A. That is all I can say.

Q. I am asking you the date of the invoice, if you can give it to this jury, please.

(Testimony of Francis A. Regan.)

A. I can't give the date of the month. Just the month.

The Court: Do you have that invoice in your work papers anywhere?

The Witness: The invoice is over among the records of [3015] the plaintiff in the Sunkist Building, sir.

Q. (By Mr. Dixon): In other words, you examined this one invoice. What other invoices, with reference to cans, did you examine during the year '49?

A. I made a note of one here. In September of '49 for the 18-ounce cans.

Q. This is also in September. Did you make any examination of any other invoices for any other months in '49?

A. I believe I did, sir, yes, sir.

Q. What months?

A. I made no note on those particular invoices. The reason I did not make the note was that I was comparing invoices in the September, '49, to September, '51.

Q. Do you know whether additional discounts would be given for quantity purchases on cans, depending upon the amount purchased?

A. To my recollection in examining these vouchers there were no quantity discounts.

Q. But you didn't examine it for that purpose, did you?

A. Not for that specific purpose, no, sir.

(Testimony of Francis A. Regan.)

Q. All right. What was the price of cartons from invoices that you examined in '49, Mr. Regan?

The Court: Invoices in what year?

Mr. Dixon: '49, for cartons.

The Witness: I don't believe I have the '49 carton cost, [3016] sir.

Q. (By Mr. Dixon): You don't have that?

A. No, sir.

Q. So you just assumed that the figures that you took from '51 would be larger than they were in '49, in increasing the costs of cartons?

A. I wouldn't say that was my complete assumption, Mr. Dixon. I was just using '51 costs; and relating those costs to the costs Mr. Hodge used, I would say my assumption from that comparison would be that the costs were higher.

Q. You didn't, then, as a matter of fact, go back and compare these costs that you arrived at with the actual books and records of the company for these items in '49, did you? A. Yes, sir.

Q. All right. The comparison was the comparison you just testified to as having been made by comparing a few invoices?

A. Generally a few invoices, yes.

Q. The same with cartons?

A. The same with cartons.

Q. What about labels?

A. I have no note on the labels as to a comparison between '51 and '49.

Q. You don't have any notes on labels?

A. No, sir. [3017]

(Testimony of Francis A. Regan.)

Q. You know, as a fact, do you not, that there was an ample supply of labels in the supply store of this company in 1951, or did you know that?

A. I didn't hear that question.

The Court: Read it, Mr. Reporter.

(The question was read by the reporter.)

The Witness: I don't know it as a fact, sir.

Q. (By Mr. Dixon): Well, directing your attention to 65, Plaintiff's 65, it contains an item there on the balance sheet of supplies in the amount of $41,225.40. Do you know of what that item consists, Mr. Regan?

A. May I have a copy of the exhibit to which you are directing my attention, sir?

Q. I thought you did have it.

A. Now, if I could have your question again.

Mr. Dixon: Will you read the question?

(Question read.)

The Witness: I have a general knowledge of what that item would consist of, yes, sir.

Q. (By Mr. Dixon): Will you tell the jury what it consisted of?

A. Generally, that item would include cans, cartons and labels, principally.

Q. Do you know the breakdown of that item?

A. No, sir. Of the $41,000 figure, I do not have a breakdown of it at this moment.

Q. Did you run through the books of the company to see whether those purchases had been made

(Testimony of Francis A. Regan.)

in anticipation of processing operations during the 1951 processing season?

A. I could not identify such an anticipation from the records alone.

Q. In any event, you don't know when they were acquired, [3019] whether they were acquired for the season's operations of 1951?

A. I do not know, no.

Q. Now, will you tell this jury, directing your attention to Exhibit CB, how you [3020] arrived——

* * *

Q. Will you explain to the jury how you arrive at the $44.99 figure as being the amount that you concluded it would have cost the plaintiff per ton to have processed 12,000 additional tons of Valencia oranges in 1951?

A. Yes, sir. That cost per ton was determined in this manner. I first determined the cost by case size and can size in proportion to the tonnage that would be processed in those particular sizes. I determined that the cost per can size was as follows: for the 5½-ounce size——

Q. Let's take the 12/46.

A. The 12/46 size, the total cost per ton was $38.05.

Q. Thirty-eight dollars and how much?

A. Five cents.

Q. Will you tell the jury how that was broken down?

A. Yes, sir. Cost of cans, $16.43. Cost of cartons,

(Testimony of Francis A. Regan.)

$2.60. Cost of labels, $1.18. Other ingredients, $2.44. Plant expense, $15.40. A total of $38.05

Q I assume that this other figure that you got here, $44.95 per ton, is the upward average of the processing cost computed on a comparable basis for what you thought would have been processed under this contract in other can sizes, is that correct?

A. That is substantially right to this extent, sir. I computed a similar cost on each can size determined by [3021] applying the tonnage involved to each size, the total cost for the particular can size, and extended the amount. That totaled a figure which was $41.92, as I recall.

Then to that figure, in order to make it comparable with Mr. Hodge's, I included a portion of my administrative expense to the same extent as Mr. Hodge did. That is $3.07 a ton, I believe.

Q. Well, now, you referred to an item of $2.44 per ton which was charged to other ingredients. Don't you know that in single-strength Valencia juice no other ingredients are added?

A. That may be true on occasions and maybe not true on other occasions, sir.

Q. Just what is the fact? Do you mean sometimes other ingredients are added to the juice and sometimes they are not?

A. That would appear to be true from the books and records of the plaintiff, sir.

Q. Have you perhaps confused the fact that in making the blended juice, and in making navel

(Testimony of Francis A. Regan.)

juice, other ingredients, such as sugar, are sometimes added, but that they are not added to single-strength Valencia juice?

A. That would be true, sir. However, I want to further explain that answer. [3022]

Q. That could be true?

A. That could be true.

The Court: Let him explain it.

Mr. Dixon: All right.

The Witness: The basis for including that was the same basis that Mr. Hodge included in his computation an item of other ingredients, which amounted to a figure that is about 30 cents a ton less than that. I do not have a breakdown of his individual cost figures here.

Q. (By Mr. Dixon): Well, in your computation it amounts to $2.44 out of your total of $38.05, doesn't it? A. That is right, sir.

Q. So if no ingredients were added to single-strength Valencia juice, that item could be taken out of your costs, is that correct?

A. That is right, if no ingredients, no other ingredients, were added, the cost would be that much less.

Q. And you have included that $2.44 item in computing your average tonnage cost for all sizes of single-strength Valencia juice produced under the 12,000 tons that we are talking about, isn't that true? A. That is true.

Q. So if it isn't properly there, it should be taken out of your computations for all the others.

(Testimony of Francis A. Regan.)

I think you mentioned an amount of $15.40 for additional [3023] plant expense. Will you tell the jury what that item consists of?

A. Yes, sir, that is the counterpart comparable to the eleven dollar some odd cents figure that Mr. Hodge used in his computation. That is the cost of running the plant generally, including direct labor, and the other expenses related to operating the plant.

Q. For example, do you mean you think additional supervision would be required and additional executive supervision?

A. I do, sir, for this reason: We have a problem here in computing costs relative to 12,000 tons of Valencia oranges, which would flow through the plaintiff's plant between the months of July and November. During that period of time the plaintiff actually had run a total of 5,000 tons through the plant in 1951. By including the 12,000 tons, in addition, it would mean that during those months a total of 17,000 tons of fruit would flow through this plant. And in addition to that the largest Valencia tonnage that this plaintiff has had, based upon my examination of the records, in any one year, was 13,000 tons. This plaintiff has actually, in 1951, run about 5,000 tons through their plant. Interposing 12,000 tons on top of that would mean a capacity of 17,000 tons of Valencias, which this plaintiff had not reached. [3024]

Now, doing that within a short period of time

(Testimony of Francis A. Regan.)

would necessitate other expenses you spoke about, which would call——

Q. That is in your opinion?

A. In my opinion that running 12,000 tons during a period of time, when 5,000 tons was actually run, would call for more employees, which in turn would call for more supervision.

Q. Yes, more employees, but that is already included in Mr. Hodge's cost per ton, is it not, the labor? A. At '49 cost, sir.

Q. Labor cost?

A. I am including it at '51 costs.

Q. All right. You have a right, of course, to do whatever you want to in your computation. But that was already included in Mr. Hodge's figure, was it not, the labor cost?

A. The labor was included at '49 costs, yes, sir.

Q. What was the difference, then, in dollars per ton, between his expense item which covered labor and supervision per ton, and your figure per ton?

A. I don't know what Mr. Hodge had in his figure for labor, and on my figure that is a total of all plant expenses. It is not broken down, and I do not have a breakdown as to direct labor alone. It is a total for all plant expenses. [3025]

Q. What did Mr. Hodge charge for plant expense in his computation, do you recall?

A. I believe it was $11.40. That is from my recollection.

Q. And yours is $15.40?

A. That is right.

(Testimony of Francis A. Regan.)

Q. Now, will you tell the jury how you arrived at the $15.40 per ton for plant expense for all types of cases of juice?

A. I took the amount of plant expense——

Q. Rather than take up the time on how you computed it, will you tell the jury how you arrive, I mean by item, at the $15.40 plant expense figure in your tonnage computation? A. I——

Q. Do you understand my question?

A. I do, sir.

Q. Will you break it down, please, in dollars and items? A. Break the $15 down?

Q. Break the $15.40 down so the jury will know what items you considered and how much you charged for each item in that $15.40.

A. That I haven't done, sir, and that would be quite a computation to do it. [3026]

Q. Do you mean in making up this figure of $15.40 you didn't break it down, you didn't add some items together to get $15.40?

A. I took the total plant expense, which included all those individual items, and computed it on the total, not on the individual items themselves.

Q. In other words, this $15.40 item per ton is the amount, if I understand your testimony, that is charged to plant expense across the board for all sizes of juice; that is correct, isn't it?

A. That is generally correct.

Q. You now say that you cannot tell this jury specifically the items which go into your computa-

(Testimony of Francis A. Regan.)

tion of plant expense, and what you charge for each item in arriving at the $15.40 per ton figure?

A. I cannot tell the individual costs per ton for each item, sir. The computation wasn't made in that manner.

Q. In other words, you can't break down the $15.40 per ton to tell this jury, for example, how much of that is charged to labor, how much to other items that you regard as properly chargeable to plant expense.

A. That is right, sir. [3027]

Q. You can't do that?

A. No, sir, because I have not done it up to this point.

Q. Now, Mr. Regan, again referring to CB, according to your computation, you are of the opinion that an additional $10.93 should be added to Mr. Hodge's figure of $34.06, then, as the additional cost per ton which must be added to his figures?

A. Yes, sir.

Q. For processing? A. Yes, sir.

Q. So that there is a difference between you and Mr. Hodge of that amount in the figures that he used and the figures that you used?

A. Yes, sir.

Q. You can't tell this jury the basis of the question that I asked you how you break down this item of $15.40 per ton chargeable for all classes of juice, I mean all cases of particular sizes of juice that might be processed from the 12,000 tons?

(Testimony of Francis A. Regan.)

A. That's right, sir, and the reason again is that——

Q. All right.

The Court: Do you have some other reason other than the one you stated?

The Witness: The reason is expressed this way, sir. [3028] I treated the plant expense as a component part in itself without breaking it down any further. That is what I am trying to explain to Mr. Dixon.

The Court: Go ahead.

Q. (By Mr. Dixon): Now, directing your attention to 61, Mr. Regan, the selling expense for that year in 1949 against all of the tonnage for all types of fruit processing was $86,855.15, is that correct?

A. I do not have a copy of 61, but I believe that is correct, sir.

Q. To that amount you have added——

The Court: The Court has handed the witness a copy, let the record show. Go ahead.

Mr. Dixon: What's that?

The Court: I said to let the record show that the Court has handed the witness a copy of the exhibit.

Q. (By Mr. Dixon): Is that correct, Mr. Regan?

A. I don't think you finished the question, sir. I did not hear all of it.

Mr. Dixon: Read it.

(Testimony of Francis A. Regan.)

(Record read.)

Q. ——additional selling costs of $37,729.62, have you not? A. No, sir.

Q. Well, directing your attention to CB, I notice that [3029] item you refer to, increase in selling expenses. Isn't that what we are to conclude, that that amount that I have just mentioned is to be added to the 1949 selling figure? A. No, sir.

Q. That was used by Mr. Hodge?

A. No, sir. That figure was not used by Mr. Hodge.

Q. And to the administration figure you have added for 1949 some additional amounts, haven't you? A. For the year 1949——

Q. For administration? A. No, sir.

Q. In your computation. I am talking now about arriving at the figures in CB.

A. No, sir. I will answer it this way, sir. I believe you may be slightly confused on what were the basic figures used by Mr. Hodge. They would be the selling and administrative expenses as set out in Exhibit 65, not 61. The selling expense I added was in addition to that set out in 65, not in addition to that set out in 61.

Q. I think perhaps we come to the same place. Maybe we don't. But I take it from your CB, Mr. Regan, that you added additional items in the amount of $107,451.46 to Mr. Hodge's computation. Is that what you are doing in CB?

A. Yes, sir.

(Testimony of Francis A. Regan.)

Q. So that actually Mr. Hodge shows from CB, from your [3030] CB, a profit of $25,231.45 on the this additional operation, I mean combined with the other operations, whereas you show a loss on the 12,000 tons of $28,305.83, is that correct?

A. That is correct, sir.

Q. So that there is a difference between your figure and Mr. Hodge's figure of how much?

A. $238,060.48.

Q. And that $238,060 figure or difference between your computation in CB and Mr. Hodge's computation in 69 is made up of the addition of the $131,160 item to the processing cost, is it not?

A. Yes, sir.

Q. Plus the $37,729.62 in increased selling expenses? A. Yes, sir.

Q. Plus an additional $40,000 for administration expenses? A. Yes, sir.

Q. Plus $19,577.38 that you think should have been added for additional administration expenses, exclusive of your item of $40,000, is that correct?

A. Yes, sir. That is the balance of the actual expense for 1951, the year ending January 31, 1952, which had not been included by Mr. Hodge.

Q. At least that is your opinion on the matter?

A. Based on the figures, to me it is a fact. [3031]

Q. So that according to your computation on CB, the more oranges that this plaintiff processed in 1951, if they had had an additional 12,000 to be processed into single-strength Valencia juice, the

(Testimony of Francis A. Regan)

greater the loss would have been, is that your result, in a few words?

A. If the additional tonnage was processed under the TreeSweet contract.

Q. So that the more they processed in 1951, the greater the loss, is that correct?

A. That would be correct if the more was processed under the TreeSweet contract terms.

Q. Because even if we regard the 12,000 tons we have been talking about as a separate item, it is your view from your computation that the plaintiff would even have lost $21,351.79 on that particular operation?

A. I did not quite follow you on that, sir. Could I have it read?

The Court: Read it.

(Question read.)

The Witness: That's right, sir, as I have computed in Exhibit CC. Now——

Q. (By Mr. Dixon): Did you go so far as to determine how much you would have to pay for this or how you would spend this additional—was it $60,000, for administration expense? [3032]

A. The additional 40,000, you mean, sir?

Q. Yes, or whatever the figure was that you used.

A. According to my computation the money would be expended in the same manner that the company had expended $93,000 in connection with the processing of 8,000 tons.

(Testimony of Francis A. Regan.)

Q. In other words, you think the president of the plaintiff company, if they had taken on an additional 12,000 tons, would have had to have hired some more administrative officials to the amount of an additional forty or sixty thousand in 1951?

A. No, sir. In arriving at the $40,000, I have lowered the figure to $40,000, and it does not include additional salary or travel to Mr. Winckler.

Q. I am not talking about Mr. Winckler. I am talking about the additional amount of employees that you figure you would require here to handle the administration end of it, other than those that were there in 1951, to handle this additional 12,000 tons?

A. There would be a proportionate increase generally in all expenses, sir.

Q. In all expenses? A. Generally.

Q. In other words, the office force that did the billing would need some additional people there to do that, that is your administration cost? [3033]

A. The office force is part of the administrative expense, yes, sir.

Q. You don't think that the force that was there handling the amount in 1951 could also have handled the billings for this additional sales?

A. In part they probably could, sir. [3034]

Q. Well, then, how do you arrive at this additional $40,000? Is it for salary? A. No, sir.

Q. What is it for?

A. It is based upon a review of the $93,000 that was actually expended. And based upon the items

(Testimony of Francis A. Regan.)

that I have mentioned, the problems that would relate to processing an additional 12,000 tons during this relatively small part of the year, when the capacity at that time would then be greater than it had ever been before, there would be administrative problems that would be costly.

Now, as to dollars and cents how much would be spent in addition for stationery, postage, items like that, that $40,000 was not made up of component parts. It is in my opinion based upon the examination of the $93,000, that is what I believe would be a reasonable additional cost of administrative expense.

Q. But you can't tell this jury how you break that $40,000 down into necessary employees, can you?

A. No, sir. That wasn't arrived at by an addition of a number of figures. It was based on an over-all estimate, based upon the over-all $93,000.

Q. This is the first time in your experience that you ever had any occasion to contact or become acquainted with the operations of a citrus processing plant, Mr. Regan? [3035]

A. It is, sir. [3036]

* * *

OPAL SMITH

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

* * *

Q. What is your occupation?

A. Lab technician.

Q. Laboratory technician in citrus processing plants? [3037] A. Yes, sir.

Q. In what plant are you now employed?

A. Cold Gold Company.

Q. Where is that plant situated?

A. LaHabra.

Q. How long have you been employed as a laboratory technician by Cold Gold?

A. Three years.

Q. You are married now, Mrs. Smith?

A. Yes.

Q. How long have you been married?

A. Just about two years.

Q. What was your maiden name?

A. Chilcoat.

Q. Were you also known as Opal Comstock?

A. Yes.

Q. As Opal Comstock you were at one time employed by Winckler-Smith Citrus Products Company at Anaheim, is that correct?

A. Yes, sir.

(Testimony of Opal Smith.)

Q. And during what period of time were you employed as a laboratory technician for Winckler & Smith? A. '49, '50, '51 and '52.

Q. Under whose direct supervision did you work while employed by Winckler & Smith? [3038]

A. Frank Gilbert.

Q. What was his position in the plant at that time?

A. Plant superintendent and chemist.

Q. As I understand it, the operations of the Winckler-Smith Company were such that raw fruit was placed in machines called Citromats, which extracted the juice into tanks, is that correct?

A. Yes, sir.

Q. After that juice had been extracted in tanks, did you as laboratory technician have anything to do with the juice at that time, immediately after extraction? A. Yes.

Q. You did have something to do with it?

A. Yes, sir.

Q. What did you do with the juice as it was in the tank immediately after extraction?

A. I standardized it.

Q. Did you make any tests on it while it was in the tanks? A. I took a test on it, yes.

The Court: Keep your voice up.

A Juror: Louder, please.

Q. (By Mr. Strachan): A little louder.

A. Yes, I did.

Q. How did you make the tests on the juice in tanks? [3039]

(Testimony of Opal Smith.)

A. I took the Brix test and acid test.

Q. That was from a specimen or sample taken from a tankful of juice by the tank man, is that correct? A. Yes, sir.

Q. After the juice in a tank or a batch had been tested and canned, did you make any further tests on the juice in the can?

A. Yes, sir, after it was canned.

Q. So that on a single batch or tankful of juice you would make two tests, one as it was originally found in the tank, and another as it was found in the cans after it had been sealed in the cans, is that correct? A. Yes, sir.

Q. Were the results of these analyses or tests which you made regularly recorded on a written record provided for that purpose? A. Yes.

Q. Were the entries in those made by you as laboratory technician during the regular and ordinary course of business? A. Yes, sir.

Mr. Strachan: I would like to have Exhibit I-1 handed to the witness.

Q. (By Mr. Strachan): I ask you to examine the various sheets that are included in that volume called Daily Laboratory [3040] Statistics, and run through those and tell us, if you will, whether you recognize those as being a part of the records kept in the regular and ordinary course of business at the Winckler & Smith plant. A. Yes, sir.

Q. Do you recognize your signature and your handwriting on a number of those? Do you?

A. Yes.

(Testimony of Opal Smith.)

Q. Just to illustrate the method in which those records are kept, I will ask you to look at the first page of that volume, which is No. 461. On the first line there is an entry under Time; is that 11:00 p.m. or 11:00 a.m.? A. 11:00 a.m.

Q. Then under the heading which embraces the next two columns, Brix and Acid, there are two entries Under Brix there is 11.2. Will you tell us what, in the method of keeping these records, that stood for? A. That is, Brix?

Q. Yes. A. Sugar content.

Q. That is the so-called solids, per cent of solids, is that correct? A. Solids, yes.

Q. Under the next column following Raw Juice Extracted is Acid, and there is recorded 1.54 acid; will you tell us [3041] what that indicates?

A. Do you mean the difference in the two?

Q. No. Under Raw Juice Extracted——

The Court: What does the figure represent?

Q. (By Mr. Strachan): The figure 1.54 under Acid, does that indicate the per cent of acidity found in the raw juice as it came into the tanks?

A. Yes, sir.

Q. Now, following that is a heading called No. 2 Cans, with various entries there, and the first entry there drops down to the second line and follows immediately after the entries I have just read to you on the first line. Does that indicate, where it says Brix and Acid under the can section, does that indicate the results of your chemical analysis of the juice as you found it in the cans?

(Testimony of Opal Smith.)

A. Yes.

Q. And does the juice in the cans one line below, on the second line, indicate that that is the same batch of juice that was tested in the tanks and reported on line 1? A. Yes, sir.

Q. So that in the ordinary course of events you would have on one line the results of the test in the tank, and on the following line the results of the test on the same juice where it is canned; is that correct? A. Yes, sir. [3042]

Q. Now, I will ask you to—I will call your attention to the part of that page where it says sweetened orange juice. That indicates, does it not, the type product that was being run and packed at that time? A. Yes, sir.

Q. There were other symbols used in making this record which I would like to have you identify. What does the symbol OJ mean?

A. Unsweetened orange juice.

Q. As stated in these records, what does SOJ indicate? A. Sweetened orange juice.

Q. What does GF mean? A. Grapefruit.

Q. Sweetened or unsweetened?

A. Unsweetened.

Q. What does SGF stand for?

A. Sweetened grapefruit.

Q. What does BJ stand for?

A. Unsweetened blend juice.

Q. That is just blends of different citrus juice with no sweetening added? A. Yes.

Q. What does SBJ stand for?

(Testimony of Opal Smith.)

A. Sweetened blend juice.

Q. What does SNO stand for? [3043]

A. Sweetened navel orange juice.

Q. Now, in some instances in the record there is no designation by the symbol or otherwise as to the product being run. Is it possible for a person experienced as a laboratory technician, as you are, to conclude from the entries that are made showing the results of the analysis what the product was that was being canned?

A. You mean the kind of juice that was being made?

Q. Yes. A. Yes.

Q. You can tell that from these records and from your experience, even though there is no express designation on the page, is that correct?

A. Yes.

Q. Are you able to tell the jury what was done with these daily laboratory statistics after the records were completed by you and the other technicians who might be on duty?

Mr. Dixon: Now, if the Court please, I don't know how long this is going on, but I would like to object to any further testimony along this line and ask to be heard in the absence of the jury if we are going to have an extended argument on this matter.

The Court: How much further foundation do you propose to lay? [3044]

Mr. Strachan: I think it is substantially completed, your Honor.

The Court: Finish your foundation and we will

(Testimony of Opal Smith.)

take the recess and hear counsel. Maybe it can be stipulated that the witness' testimony as to Exhibit I-1 for identification would be the same generally as her testimony as to I-2, I-3 and I-4.

Mr. Dixon: Oh, yes, your Honor, I assume so.

The Court: All right. What other foundation do you want to lay?

Q. (By Mr. Strachan): Referring again to page 4——

The Reporter: There was no answer to the last question.

The Court: Read the question.

(Question read.)

The Court: Objection overruled. You may answer.

The Witness: They were taken to Mr. Winckler's desk.

Q. (By Mr. Strachan): Now, I would like to ask you to refer again to the figures appearing on the first page of this exhibit, 461. I call your attention to the fact that the acid as recorded in the raw juice showed, according to the test there, as 1.54 per cent, whereas in the canned product it was recorded at 1.27 per cent acid. Can you explain how the change in acidity was accomplished?

A. Water was added.

Q. Now, again in the next line, referring to the second [3045] of the three batches run that day, the acidity of the raw juice at 154 appears in the cans

(Testimony of Opal Smith.)

as 124. Is that an indication again that water was added? A. Yes, sir.

Q. And likewise the acidity on 150 in the third batch appears in the canned form to be 123, which would indicate water was added again at that point, is that correct? A. Yes, sir.

Mr. Strachan: I think that's all the foundation, your Honor.

* * *

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: The record will show the jury absent.

Do you offer in evidence Exhibits I-1, 2, 3 and 4?

Mr. Strachan: I want some more explanation. I want some particular pages identified and her interpretation of those particular pages, in addition to the exhibits.

The Court: Then you propose to offer the exhibits in evidence?

Mr. Strachan: Yes, sir. [3046]

The Court: What is your objection?

Mr. Dixon: If the Court please, I am objecting to any further testimony along this line on the ground that it would not tend to prove or disprove any of the issues in this case, that it is wholly irrelevant and immaterial to any of the issues of this case. I can only surmise, and that is why I am objecting at this point, as to what——

The Court: Let me stop you then.

Mr. Dixon: Yes, your Honor.

The Court: I intended to ask Mr. Strachan. What do you think this testimony and these exhibits prove? For what purpose do you offer this testimony?

Mr. Strachan: Well, it is for a variety of purposes, your Honor.

The Court: Let's have them.

Mr. Strachan: For one thing, it will corroborate some of the complaints that were made against the quality of the product and show that there was actually a foundation for the complaints made that the juice was watery.

I would use it, also, to show that Mr. Finley, when he was considering whom he might contact for the purpose of entering into processing agreements, didn't wish to contact Winckler & Smith because he had heard that their products were watered.

It will go to the question of damages in that it will [3047] show that there was an inferior product and not a Grade A product, such as Mr. Winckler testified.

It will serve as direct impeachment of Mr. Winckler as to whether or no his products were adulterated and whether he knew they were adulterated, and whether he knew that these records were being kept.

I might say this, your Honor, that the issue was clearly raised in the opening statement when Mr. Hurd told the jury that he would show that Mr. Winckler's business practices worked an imposition on the public, among others.

Mr. Dixon: Your Honor, I am glad to know what the purpose of this offer is after counsel has indicated what use he intends to make of this kind of testimony, because I think that will be of considerable help to us in determining whether this objection should be sustained or overruled.

It is already in the record here, your Honor, in cross-examination of Mr. Finley, and I think of any other official of Sunkist that had anything to do with any processing arrangement, so-called, that no examination was ever made or caused to be made by the plaintiff of its products.

The Court: By the defendant, you mean?

Mr. Dixon: I mean by the defendant of the plaintiff's product prior to this lawsuit or prior to any refusal to give any oranges or to make them available to the plaintiff, as requested in 1951. This is the best example that I know [3048] of of after the fact use of testimony that can be injected into a case through the back door rather than by direct testimony.

The Court: I have your point on that.

Mr. Dixon: Now, secondly, counsel has already stated, and it seems to me that the testimony I have just mentioned must be either repudiated, and I don't see how it can be repudiated, if the witness told the truth on cross-examination under the rule, that counsel said he had heard it was uttered. That is obviously hearsay testimony, if admissible, so that it can't possibly be admitted on that ground unless that is an afterthought, and that is going to be the testimony as of now, although it was not in-

dicated to the plaintiff corporation in any way at the time any refusal was indicated to the plaintiff corporation that fruit was not available.

So that we have no foundation under the evidence in the case or any evidence that can be produced, at least in my view, based on the testimony already in this record, that assuming this is a factor, that it in any way could have entered into the refusal of any processing arrangement or the making available of oranges to this plaintiff in any way in 1951.

I would be the first to concede, your Honor, that had there been any statement made by the defendants or had any such excuse been related or reason given to the plaintiff at [3049] the time of the refusal, that this might be admissible evidence in support, not as proof of, but in support of the reason for refusing to do it, to make oranges available to the plaintiff. But that is not the situation we have here.

What has happened is we have positive evidence to the contrary in the record. We have the statement of counsel that he expects this witness from Sunkist, whoever it is, to come in and say they refused because they heard, they heard, h-e-a-r-d, not from their own knowledge or from any investigation that they made prior to a refusal that such was the case.

So I submit this evidence, if that is what it is used for, and assuming it is relevant in some way, assuming that there may be something wrong with this, and that is a question we are obviously going

to have to go into, and it may take considerable time if this is to be injected into the case, and an explanation would have to be made because it would be highly prejudicial otherwise. If this line of testimony and evidence is permitted in the record, it would have to be explained, so that on that basis it doesn't go to any issue in the lawsuit, as I see it, framed by the evidence now in the record and before this Court in connection with the complaint and the answer and the pleadings in the case.

Now, furthermore, it seems to me that this type of evidence if of any weight at all, according to counsel's view [3050] of what he is offering it for, would require an endless amount of testimony on the part of customers and buyers of the plaintiff's product, and particularly single-strength Valencia juice, that they analyzed it, rejected it because it allegedly had water somewhere in the product. How that could be determined, I don't know, but let's assume that they could determine that and that because of that they refused to purchase the plaintiffs' product and, therefore, because they refused to purchase the plaintiffs' product, this plaintiff would have gone out of business because of this particular type of evidence.

Now, that is the argument and that is the alleged relevancy of this type of evidence, as I understand it. [3051]

Now, tested by that yardstick, and assuming that it is in evidence, the defendant would have to show that this was the cause of loss of sales. And that presupposes knowledge on the part of those who

were purchasers, potential or actual, not by hearsay evidence, your Honor, but by direct evidence, which is the only kind that should ever be admitted on any kind of a situation such as is now being presented to this Court by this evidence.

Because, obviously, this is not a case, again, in which, we hope, we are going to be required to overcome unfavorable inferences that might be created in the mind of the jury against the plaintiff, in this case for violation of antitrust laws, by showing through extended evidence, and so forth, that this was or was not a proper and legitimate procedure.

In other words, that goes into the question—I assume the defendants here are offering this to show that perhaps there has been some violation of law of some kind by the plaintiff.

The Court: I think I have your points. I want to ask Mr. Strachan some questions and I will hear from you later.

Mr. Dixon: Yes.

The Court: You say, No. 1, with reference to complaints made. Do you have any evidence in the record of complaints made that water was in the juice? [3052]

Mr. Strachan: One of the complaint letters that we have referred to already was that the juice appeared to be extremely watery.

The Court: I remember letters that talked about the juice being bitter or acid; I don't remember about water. But let's not forget that those letters were not offered for the proof of the facts that are contained therein.

Now, let's take No. 2, Finley.

In the absence of a showing that Finley knew what were in these records, which I don't think you can show, I don't think they have any bearing on that.

This after-the-fact situation is a very astounding position for competent counsel to take.

I suppose Mr. Finley could say that he had heard certain things and be subject to cross-examination on what he heard.

Mr. Strachan: That is right.

The Court: If the defense wanted to base a refusal on what he heard. Then your defense would be based on hearsay and subject to the cross-examination of the plaintiff in that respect.

But even if Finley had so testified that he had heard such things, the fact that there was also found in the books, after he got into the case, something that might support your contention, doesn't make sense. Because how can you rely on something that you didn't know anything about? [3053]

Now, you say as to damages, that it was an inferior product.

Mr. Strachan: I will say, further, it is a spurious product. These are spurious products. They are not inferior; they are spurious, they are adulterated.

The Court: That goes into issues. I recall some testimony. I would have to see it now in the record, that as this juice went through some vat there was a precipitation that came off, which was again collected and added back.

Mr. Dixon: That is precisely all this relates to.

Mr. Strachan: It does not, and I will show it does not. I will show this is tap water.

The Court: Let's assume that you are going to show tap water, the point is that apparently precipitated water is added. It is water. Now you want to inject an issue that instead of the precipitated water, that there is tap water that goes in. We haven't a Food and Drug case.

You would have to follow with what Mr. Dixon says, and then follow that the loss of sales was due to this adulteration of the product, which you so far haven't undertaken, and which I doubt that you can sustain.

Mr. Strachan: If there is any doubt as to my sustaining it, I want to clear that up. I can make a very precise offer of what this evidence will prove.

The Court: Finally, you mention impeachment of Winckler. [3054] What was it that Winckler said that you are going to impeach?

Mr. Strachan: Before I get to that, it is pointed out to me that this bears on damages in this respect, too: In that what he is suing for is loss of profits, and I think this evidence will show the consistent practice of diluting orange juice and other products, which Mr. Winckler said were not diluted. What he is claiming is damages for not being permitted to sell water or watered products.

And getting back to the causation question, I think whether his product was good or bad has a bearing on why he went out of business. The question of causation. As the record stands now, Mr.

Dixon would be at liberty to argue that they had a fine product, it met the Grade A specifications of the Federal Government, and he had a fine product there which had gained public acceptance and he was entitled to continue selling it, and he would have continued to sell it.

Now, getting to the question of impeachment, beginning at page 1031 of the the transcript. This is Winckler.

"Q. Coming back to this first label, does 'Fancy' on the Anagold label mean that the contents of the can would grade fancy according to the standards of the United States Government?

"A. We believe it would, in spite of the fact that it [3055] was never examined by a government inspector.

"Q. You had your own inspection service, did you not?

"A. We had our regular plant inspection.

"Q. With laboratory analysis and such like that? A. Yes, this is correct.

"Q. Based on that you want the jury to understand that 'Fancy' on an Anagold package means that it would meet the specifications and requirements of the Government Grade A of fancy quality? A. Correct.

"Q. Here is another Anagold label. Instead of saying 'Fancy' it says 'Fancy California.' Would the use of 'California' in any way indicate a difference in quality between that product and the one that is marked 'Fancy'?

"A. No, it would not.

"Q. So you would say that the California Fancy——

"A. The word 'California' is just added simply to identify it that it is packed in California and not in Florida. It would have no bearing on the word 'Fancy.'

"Q. You want the jury to understand that the California Fancy Anagold would meet the specifications of Grade A Fancy as defined by the Department of Agriculture? A. Correct.

"Q. I believe under the government definitions of orange juice, a citrus product that is sold as orange juice [3056] contains no ingredient other than the juice extracted from fresh fruit, is that correct? A. That is correct.

"Q. Sweetened orange juice contains no ingredient other than the juice with dry sugar added, is that correct? A. That is correct.

"Q. Those same restrictions apply to grapefruit juice and to blends, is that right?

"A. That is correct."

Then I go to page 1041. This is an answer.

"A. No. The liquids—the oil evaporated, we had no oil recovery, because the oil went out with the vapors. There was no oil recovery. But we recovered, as you stated, the other liquids, which is, basically speaking, a part of the water contained in the natural fruit. That was collected in another small stainless steel tank which was a part of the equipment and which stainless steel tank received that condensed other liquids automatically without ever getting in contact with any outside air.

"Q. Well, was it the practice of the Winckler-

Smith plant then to restore to the extracted juice after de-oiling the same identical liquids that had been taken out of that juice in the de-oiling process?

"A. Well, what we call condensate, which I said was two to five gallons per hundred gallons, which was separated [3057] by the de-oiling equipment in the receiver, the little stainless steel tank, that automatically went back into the juice because there was nothing added and nothing taken away.

"Otherwise, we would have sold concentrated orange juice instead of single-strength orange juice.

"Q. To follow that up a minute, then it isn't permissible when you are making orange juice to be sold as orange juice to introduce tap water into the product, is that correct?

"A. That is correct, but that water that we are referring to was not tap water. That was the condensate which came from the orange, and I think you stated before that fancy orange juice means that it doesn't contain anything except what is in the orange.

"Q. After the juice has been extracted and is in the tanks there following this de-oiling process and restoration of the condensate, is it tested by chemical procedures to determine quality?

"A. Yes, it is.

"Q. What are those tests? I mean what do they test for? I don't want to know what the tests are.

"A. Well, I can describe it very briefly. They are tested for soluble content, for the Brix content, which is the sugar content, for the acid content, for the ratio between [3058] the acid and the Brix.

"Then the cans are tested for the vacuum. The cans, if they are properly sealed, have to show a certain vacuum.

"I think they are about the most important steps.

"Q. If on testing a batch of juice which has been fully processed and is ready for packing, it is found that the acid content is too high to comply with the specifications for orange, fancy, we will say, is there any way in which the acid can be reduced?

"A. Not to my knowledge, but I would like to point out that the acid content was checked, not after the juice was already extracted, but it was checked primarily, as I stated before, when we received the load of fruit, and if we received a load of fruit which was not up to the proper standards, we rejected such load.

"Q. All right. But if after you have processed fruit that you have accepted, and your analysis shows that it is too acid to meet government specifications, is there any way in which the acidity can be reduced before it is packed in the cans?

"A. The only way that I know that it can be done is that you blend a high acid tank with a low acid tank, and by blending the two tanks you bring down the acid content.

"Q. Are there some products where it is permissible to change the acidity if you brand the product something other [3059] than orange juice?

"A. I have no knowledge of any products or of any way to change the acidity. I have to state that I am not a chemist. I was managing the plant as general manager, and my burdens just couldn't in-

clude all the little details which were involved in production. But I have no knowledge that there is any way in any plant, or in any product, to change the acid content."

Here is further testimony beginning at page 1225 of the transcript:

"Q. One of the products that you mentioned having manufactured and offered for sale was a group called Citrus Cocktail, is that right?

"A. Correct.

"Q. What products did that embrace?

"A. The Citrus Cocktail is, basically speaking, a blended juice which was mentioned in this Court several times, a blend of orange juice and grapefruit juice. The only difference between the regular blended juice and the citrus cocktail is that there was a little bit of lemon juice added to it, which gave it a tangy flavor, and the Citrus Cocktail was really meant to be more or less part of the trademark.

"Q. Now, it was composed only of orange juice and grapefruit juice and lemon juice?

"A. There was a very little lemon juice added to it. [3060]

"Q. A little lemon juice?

"A. A little lemon juice to flavor it. That made the only difference between the customary blended juice which is manufactured by everybody and the Citrus Cocktail.

"Q. During what periods did you pack Citrus Cocktail?

"A. We packed Citrus Cocktail in 1946 and we

packed in 1949 and we packed in 1950. Whenever we could get—we didn't pack in 1951 because we couldn't get Valencia oranges, I believe. It could be that we packed a very small quantity even in 1951.

"Q. Were the oranges used in the Cocktail Valencias? A. Yes, they were.

"Q. Did you ever use any navel oranges in packing the cocktail?

"A. Not that I would recall of. We definitely didn't use any navel oranges prior to 1949. It is possible that in 1949 maybe we used a very small quantity to blend it with the Valencia oranges, but I don't believe so.

"Q. There was no citric acid or anything of that sort added to change the acidity of the product, was there?

"A. No. Lemon juice was added to change the acidity.

"Q. Never any citric acid?

"A. Never any citric acid.

"Q. Now, that cocktail was packed in two sizes, wasn't it, No. 2 and No. 3 can?

"A. Correct. No. 2 and the 46-ounce." [3061]

Then on the same day; beginning at page, I guess it is 1198 of the transcript:

"Q. I show you this volume that has been marked Exhibit I, called Winckler & Smith Daily Laboratory Statistics, January 8, 1951, to December 17, 1951, and call your attention particularly to sheet No. 735, dated July 10, 1951, and ask you if you recognize that as being the form of Daily Laboratory Statistics used in the plant.

"A. Yes, I do recognize the form.

"Q. At the extreme—well, it starts out Plant Equipment, and then a code—what does that code mean, do you know?

"A. I wouldn't know.

"Q. And then the column in the left-hand side says 'Time,' and the next column is headed 'Raw Juices Extracted,' broken down into subheading, 'Brix' and 'Acid.' A. Yes.

"Q. Can you tell us what, in the ordinary course of business, was recorded under the column 'Time' and what was recorded opposite that time in the column 'Raw Juice Extracted'?

"A. Well, under the column 'Time,' as the word implies, it means when the sample was examined, the [3062] hour when the sample was examined.

"Q. Where is the sample obtained?

"A. On the raw juice?

"Q. Yes. A. From the raw fruit.

"Q. From the fruit or from the juice?

"A No. Well, I don't know how to answer that. You can't get juice unless you have fruit. The juice has to be extracted from the fruit.

"Q. But this is taken from the tank, isn't it, or whatever vat the juice is in after it has been extracted from the fruit?

"A. Well, I am not able to answer that question. That could have been samples taken from the fruit bin as the truck was unloaded, and then—just a second—the fruit extracted in the laboratory for sample purposes to identify the Brix content and to identify the solids, that could be one thing.

"Q. Brix and solids are one thing, are they not?

"A. No, they are not. Brix and solids are two different things.

"The Court: Well, tell us again, because I don't know.

"The Witness: Well, the way Mr. Finley explained [3063] it, and I try to get close to his explanation, soluble solids are all solids included in the orange. In other words, not only the sugar content, but also the acid content.

"Now, the amount of soluble solids is, basically speaking, the result of two factors, how many gallons of juice is in a ton of oranges and what the solid content is of one gallon of juice."

Then I will skip a little of the colloquy and get over to page 1200.

"Q. (By Mr. Strachan): Now, to get back to this, this is a record of some juice that was processed and canned as of July 7, 1951, is that correct?

"A. I haven't seen these damn things for so long I have to look at them a little better. In the first place, what I don't see—it doesn't state what it is.

"Q. Doesn't it say O.J. up here, for orange juice? A. I read that O.S.

"Q Did you have a product known as O.S.?

"A. No.

"Q. You had one O.J. for orange juice, didn't you? A. It could be grapefruit juice.

"Q. You mean O.J. could be grapefruit juice rather than orange juice?

"A. I don't know what the O.S. means. It can be the truck driver's initials. It can be anything.

"Q Take this next page, 736. That says G.F.

"A. That is definitely grapefruit juice.

"Q. You are sure that is not the driver's initials?

"A. I don't think so. It wasn't prepared by our regular chemist. It was prepared by a girl named Comstock.

"Q. Who is she? Was she an employee?

"A. She was for some time, years ago. Now, let's see here. What is the question now? If we canned orange juice or not?

"Q. Can you tell from this whether that referred to orange juice?

"A. I wouldn't be able to make a definite statement one way. There is a tiny little letter mark on the top, and the next page—here is a G.F., and here is an O.J., and there is one mark that could be O.J. or O.S., and I cannot identify defintely one way or the other way.

"I still stick to my testimony that we didn't can any orange juice except Silzle in any volume to speak of, and I think my testimony included that I [3065] am not including in such statements a few cases we may can for sample purposes.

"The Court: Well, does this sheet show the number of cases?

"The Witness: No, it doesn't, your Honor.

"The Court: This is laboratory testing?

"The Witness: This simply shows samples taken at a certain hour of raw juice.

"The Court: All right. Go ahead, Mr. Strachan

"Q. (By Mr. Strachan): That is page 735, is it? Yes. Well, whatever the product was, can you tell us in what size cans it was packed, according to this record?

"A. According to this record it was packed in 46-ounce cans. Now, I want to——

"The Court: Is that a No. 3 can?

"The Witness: Well, they call it sometimes incorrectly a No. 3 can.

"The Court: All right.

"The Witness: It is the same can as the 46-ounce."

The Court: Well, what has that got to do with it?

Mr. Strachan: Perhaps it isn't——

The Court: About half of what you read has no bearing on this problem at all. Do you have any more that has any bearing on it? [3066]

Mr. Strachan: This is page 1205, I think.

"Q. (By Mr. Strachan): In this laboratory record I notice that on the first line you have a date and an analysis of the juice extracted.

"A. Yes.

"Q. And then you skip a line, and then show over in the canning section the size of cans and other matters. A. Correct.

"Q. Does that mean that the lot that is analyzed on the first line is the lot that was disposed of or packed or canned as shown on the blank line following it? A. Definitely not.

"Q. It doesn't?

"A. It doesn't. You see, you take the juice and

the plant is going, by the time you take a can you don't know, it may be from a different truck load, entirely different, you don't know from which bin it comes. There is absolutely no connection.'

"Q. Then you are never able to identify from this record that these canned products——

"A. Was made from that juice?

"Q. Was made from that juice.

"A. Absolutely impossible." [3067]

The Court: Well, to take up the last thing first, will this witness testify that she can definitely ascertain that the cans that were tested came out of the very batch in which she put the test on the first line?

Mr. Strachan: She has already so testified and that was part of the regular procedure. That is the foundation I laid.

The Court: Generally, yes, but not specifically. She would pin that down?

Mr. Strachan: I understand she would.

The Court: Do you propose to show any conversation between her and Mr. Winckler?

Mr. Strachan: No, sir.

The Court: Where she told Mr. Winckler that tap water was put in the orange juice?

Mr. Strachan: No, sir.

The Court: You propose to show no conversation between her and Winckler at all?

Mr. Strachan: Not by this witness. I will connect it up, though with another witness.

The Court: With what?

Mr. Strachan: What?

The Court: What will you connect up?

Mr. Strachan: I will show that these records were regularly shown to Mr. Winckler, they bear his initials showing [3068] he has seen them. By one witness I will show they discussed this practice of adding water to these products.

I might mention what I have not already brought out, that some of the pages which I would have this witness interpret will show that citric acid was added to various products to increase acidity.

The Court: You may be seated.

I don't want to hear from you either, Mr. Dixon, right now.

This is a wondrous case. First you send counsel out here from Chicago and our ordinary pretrial procedures are interrupted so that in the course of trying to work out the pretrial we never find out an exhibit like this is going to be offered. I am as much at fault for that as anyone else, but that is one of the things that happened. Instead of having had all these exhibits identified down the line, it was not done.

Now, the obvious purpose of this evidence is to bootleg into the record after-knowledge which the defendants did not have. I don't think there is any doubt about that.

I heard Mr. Finley testify and I don't anticipate you are going to be able to prove that you had knowledge of the contents of these records. So the real purpose of it, although it is based upon alleged impeachment of Winckler, the real purpose of it is to get before the jury facts which were [3069] not

within the knowledge of the defendants at the time refusal was made, if it was made, and so forth.

I don't know. It is an amazing case. Here is a case where we hear testimony yesterday that $39,000 was paid to accountants up to December 1st, and they have been out here since then and I anticipate there will be another $39,000 or $40,000 paid to them.

I heard testimony, when we had my little trouble with Mr. Williams, about how much money had been paid to counsel, and I would be interested in knowing, although we won't go into it now, but what totally the cost of this action will be to the shareholders of Sunkist. I think it will be an amazing figure. If Sunkist wants to spend its money in hiring Chicago accountants and Chicago lawyers to try lawsuits, why, I guess that is their business, but it is one of the amazing things about this case, when the defendants were represented by able counsel here in California, that things like this, and amounts of money like this were spent.

Part of it is this attempt to put into evidence these exhibits to show definitely after-acquired knowledge which defendants did not have at the time when there were requests for agreements. In that I see the fine hand of Mr. Williams. I am confident this is one of his thoughts. He has arranged this, to offer these exhibits.

If by any chance it should go into evidence on the basis [3070] of impeachment, and that is a serious question because you concede that this woman did not talk to Winckler, the closest she came to it is showing slips that were laid on his desk and they

were initialed, but if it does go into evidence as impeachment, the jury will certainly be told, and told in no uncertain terms what it will not be considered for, and when I get through telling them what it is not being considered for, I am afraid that the exhibit will not be as effective as the defendants think it might be.

This matter of taking an exhibit that might be admissible for one small purpose and tossing it into a case where it can have the effect of being used for another purpose presents a problem. It presents a problem to the Court in its right to control the admissibility of evidence in a case.

As far as complaints made, your first ground, I see nothing to this. There is no evidence in the record, at least at this stage, except letters which were admitted not for the truth of what they contained, but were supposedly impeachment.

Secondly, most of the matter you read to me, Mr. Strachan, was brought out on cross-examination of Mr. Winckler, and although that is the proper way to lay the basis for impeachment, it doesn't always mean that the matters then become issues which are subject to impeachment.

You have mentioned that Finley made a decision, and what he had heard. That may be proper evidence. But the fact that [3071] in the records were certain evidence doesn't bolster his decision one iota. Something that was discovered afterwards in the absence of some showing that Finley or whoever the person is that you will call knew about those records and what was in them, doesn't mean

anything. They are not admissible for that purpose.

Now, you say on the issue of damages. If we went into all the issues that you raised by your offer here and by the purported basis on which you say these documents are admissible in evidence, this case would be going for another month.

In that connection, unless I have some assurance about the end of this case, I will do what I threatened before and make you produce before me all the documents you are going to produce and the names of your witnesses and I will find out what you have got left, and send the jury home for two or three days until we straighten it out.

The remaining matter, the matter of impeachment, seems to me it is impeachment on issues that aren't major issues in this case.

I will think about it over recess.

Mr. Strachan: I want to mention, your Honor, that I would also regard it as bearing upon causation. We take the position that, and would argue to the jury, that one of the reasons for the second failure of Winckler, if not the first failure, also, was the spurious product he was selling under [3072] a false label. That is one of the bad business practices I think we can fairly argue to this jury was the cause of his having failed.

The Court: How can you argue that in the face of this record that the sales that were made in 1949 and 1950 were so large, and the fact that no sales in this particular product were made in 1951? If he had had oranges, assuming plaintiffs' contention, if he had had oranges and then he couldn't have sold

them, I could see the materiality of it, but he never got the oranges, and how can you argue if he had got them he couldn't have sold them?

Mr. Strachan: What he would have sold, apparently, was water juice, but I am going to take the position one of the bad business practices he was guilty of and which was responsible for the decline of his sales and his inability to sell in the later years, was the spurious product that he was offering to the public and had been selling to the public. It was not orange juice at all. It was orangeade. He was selling orangeade as orange juice.

I might also say I think as a technical matter this evidence will definitely lend itself to an argument that there had been no public injury involved in Mr. Winckler's elimination from whatever cause from the competitive field.

The Court: Have you any more you want to add, Mr. Dixon? [3073]

Mr. Dixon: Your Honor, my position is what it was when this question was originally injected into the case by counsel on cross-examination. I think the record will show I entered an objection at that time to this line of testimony on the grounds heretofore urged for the rejection of any further evidence along this line by this witness. Well, I don't know if there is anything I can add to it.

It is just a question of the defendant setting up a strawman on an immaterial issue and then we have to try to knock it down.

I would like to get along with this case, at least

with what I feel as a lawyer is some evidence that deals with the issues.

That's all I can say, your Honor. I regard this evidence and this type of evidence and this type of examination as being resorted to for the sole and only purpose of injecting into this case something of an entirely collateral nature that has nothing whatever to do with any of the issues in this lawsuit. It is wholly immaterial whether this was a good product in the opinion of the defendants. We are not here trying the question of a violation of the Pure Food and Drug Act. That is what we would probably have to get into. That is all they could argue, that we were selling something under an illegal label, but the record belies the whole relevancy of this type of evidence, your [3074] Honor.

The facts here show an increase in sales, substantial increase in sales, not a decrease, and the question here is what would have happened if we had had access to Valencias in 1951. We didn't sell any Valencia juice in 1951 because we couldn't process any and sell it on a basis competitive with the defendants.

It is wholly irrelevant, it seems to me, to the basic issues, or any issue in this lawsuit, to inject this kind of evidence into the case. We would be here indefinitely in trying to justify it, and we would have to justify it. We would have to go into the explanation of it.

It certainly isn't relevant in my judgment on any impeachment basis.

The Court: You say it is relevant?

Mr. Dixon: It is not relevant on any impeachment basis. In other words, the testimony that counsel has read came out on cross-examination over my objection at a time when in the course of cross the discretion of the court was broad to permit examination into this type of thing, but it does not impeach his testimony, and if it does, it is on an immaterial issue in this case.

I just can't see it, whether this was watered or not watered. There is no evidence, and they can't produce any that the defendant had any knowledge, if that is the fact.

Secondly, they can't produce any evidence to show it [3075] had any effect on the sales of the plaintiff's product. That is the materiality, it seems to me, of what evidence the defendants can offer in this case, and if it doesn't tend to go to those issues, I can't see how it can do anything but confuse the jury, clutter up the record, and further extend the trial of this case to a time which in my judgment, and I say for the record I have tried many antitrust cases, but I have never been in a case where I have seen so many straw men to be knocked down as they have been in this case by the defendants.

That is only my personal opinion, your Honor, and I perhaps shouldn't put it into the record, but I feel strongly about it because we are pretty near two months now in the trial of this case, and I was hoping I was seeing the end of it, but apparently if this is to be injected into as relevant to any issue,

then I don't know when this case will [3076] terminate.

Mr. Strachan: One other matter that I would like to advert to, your Honor.

Your Honor has mentioned twice that the defendants have expended large sums of money in the defense of this case, and your Honor knows full well that through your own good offices proposals of settlement were from time to time solicited, and they were in every instance rejected, and the reason they were rejected was this: Mr. Armstrong, Mr. Wilcox, the growers who are members of the board of directors of the defendant companies here, stand charged by this Mr. Winckler with having been guilty of criminal conduct, which for one moment they do not concede and they never will concede, and I think they would have been men of very poor spirit and very poor judgment, and very poor quality of men, in every respect, if they would want to pinch a few pennies and not defend to the utmost their part in the conduct of an industry in which they represent co-operatives.

They are men of high regard in this community, and I don't think they can be blamed for having bent every resource to defeat what they regard as an utterly baseless claim, and a baseless charge against their integrity, honesty, and to defeat this claim that they are criminals and violators of federal law.

The Court: I understand they enjoy good reputations. I don't go along with you that a settlement

of the case would [3077] mean any admissions of those facts.

That is neither here nor there.

I call attention—I probably didn't go far enough—I call attention to the amount of money spent, and the type of defense put on; as I have done heretofore in the past, that here is a bankrupt corporation pressing this action, and I concluded once before that the case was being tried by the methods of grinding down and delay because of certain things I saw. That is the real significance in this case, how many issues you can inject into it, how far you can spread it out, and still preserve some semblance of justice between a bankrupt corporation and a wealthy defendant.

Whether you settle this case or not is out the window and is not the problem. It is a problem of an offer that you made that injects issues in this case where this case would go on forever.

We will take a short recess and take the matter up at that time.

(Recess taken.)

The Court: The record will show the jury absent.

I am ready to rule on this matter.

The objection to any further questioning is sustained.

Do you offer the exhibits I-1, -2, -3, and -4, in evidence?

Mr. Strachan: I offer them in evidence. And I would [3078] also like to make an offer as to what the further testimony would show.

The Court: Let's take the offer, first, in evidence.

The objection is sustained.

The objection is sustained to further questioning on this matter and to these exhibits. First considering the purposes Mr. Strachan said that they were admissible for:

As to complaints made, the letters referred to are in evidence not for the truth of the facts contained therein.

As to Finley's decision, in the absence of a showing, in the way of foundation, that Finley knew about these documents and the matters referred to, they are not admissible as an afterfact to bolster Finley's decision, which according to counsel was based upon hearsay information that he obtained.

As to the question of damages, that they would go to the question of damages or causation, alleged inferior product, we are not trying a Food and Drug case.

As far as we know, maybe people liked orange juice with water in it as well or better than orange juice without water in it, assuming that you could prove that tap water was put in it.

As to your alleged impeachment matters, there is a serious question as to whether any of it is impeaching. And if there is impeachment, it is on collateral issues that don't [3079] go to the merits of this case.

Finally, even if it were admitted for impeachment, the jury would have to be instructed for what purposes it could not be used for, and it presents a

serious question, evidence of this sort going into the record, in trying to protect against its misuse by instructions to the jury. The court has to weigh the probabilities of its value, its slight if any impeachment value, as contrasted with the other.

Finally, there has to be an end or some limitation to issues that can be tried in a lawsuit, and the introduction of these records and further testimony along this line would needlessly multiply the issues to be tried in this suit.

For those reasons, and for the reasons heretofore stated by the court, the objections made by Mr. Dixon will be sustained.

Mr. Strachan: Your Honor didn't expressly mention the matter of the pertinency to the question of public injury.

The Court: I don't see any pertinency to the question of public injury. Unless you are going to make a Food and Drug case out of this, and I am not going to do that, either. The record shows over a million dollars' worth of sales in the two preceding years, it shows substantially no sales of Valencia juice—those were gross sales that I was talking about, with sizable sales of Valencia juice—it shows substantially no sales of Valencia juice in the year when damage [3080] is claimed, and the contention of the plaintiff is that they couldn't buy your fruit at $40 a ton and make Valencia juice; that you nevertheless had contracted with your and their competitors so that your and their competitors could make Valencia juice. Therefore, this other matter of public injury, based upon any matters

contained herein, is one step removed from the problem.

Now, do you want to make an offer of proof?

Mr. Strachan: Your Honor, I want to call attention to this: That the exhibit does not deal only with Valencia juice, or only with single-strength juice, it deals with all of the citrus products, and the exhibit will show that those citrus products, which should have contained nothing but the juice of the fruit, were diluted consistently by the addition of approximately 25 to 30 per cent of water, in cases where water was added.

I just want to make that clear, because of your Honor's statement that the issues were limited to Valencia juice.

We would show that all of these products were adulterated by the addition of water, and in some instances not only the addition of water, but the subsequent addition of citric acid, to restore acidity where the addition of water had reduced it.

Mr. Dixon: Your Honor, I want to ask counsel whether he represents to this court that this witness, if permitted to [3081] testify, would state that 25 per cent of the liquid content of the products covered in these exhibits contained tap water.

Is that your representation as to what this witness would testify to, counsel, of her own knowledge?

Mr. Strachan, I was going to have the witness identify particular instances, and I was going to have the chief chemist of the EOP——

Mr. Dixon: I am talking about——

Mr. Strachan (Continuing): ——EOP make computations to show what the extent of adulteration was, and that testimony would be based upon these records and would show, together with the testimony of this witness, that the adulteration or stretching, as it is sometimes called, resulted in the addition of 25 to 30 per cent of tap water.

The Court: The question counsel asked you is, do you expect to show that by this witness, will she testify that 25 per cent water was added to any of these products?

Mr. Dixon: From these records that you are offering in evidence and her testimony?

Mr. Strachan: I wasn't going to have her make the computations, no. I was going to have her point out particular instances, which I will do in this offer.

Subsequent witnesses would make the computation.

As I understood it, the objection and the ruling were [3082] to this whole line of interrogation.

The Court: Let's go ahead with your offer.

If you are going to prove by a particular witness, tell us what you are going to prove.

Mr. Strachan: I am talking now about what the testimony of this witness would be.

The Court: All right.

Mr. Strachan: I would refer the witness to page 484 in Exhibit I-1 and show by her that the sheet dated July 18, 1949, bears her signature, and the records thereon are in her handwriting. That there

was a reduction in the acid content or acidity of each batch from the time that the juice was tested, when extracted, until the time it was canned; that the reduction in acidity amounted to approximately, from an average of 165 in the raw juice to approximately 130 or thereabouts, 135, in the canned juice. That the Brix test was increased through the addition of sugar. That in the first batch the addition of water would amount to approximately 18 per cent; in the second batch approximately 21 per cent; in the third batch approximately 19 per cent.

The Court: She would make those computations, would she?

Mr. Strachan: I believe she could, yes, your Honor. That is what I expect her to do.

She would also testify that the water that was added was [3083] tap water added through turning on a valve connected to a tube that led to the various tanks. That she analyzed the acidity and solids content of the extracted raw juice, and advised the tank man how much water should be added and how much sugar should be added, in order to make the raw juice with the additives correspond to a prescribed formula given to her by her supervisor Gilbert. That the tanks were so calibrated that the water was added—the number of gallons to be added was measured by the tank man by marks on the tank, so that each one inch on the tank side represented seven gallons of water.

On page 466, we would show an increase through the decrease of acidity, that approximately 27 per

cent was added to the batch recorded at 3:00 p.m.

At page 478, I would show that approximately 35 per cent of water was added to the orange juice there referred at 8:30 p.m.

With respect to page 517, sheet dated August 6, 1949, showing that the product run was unsweetened orange juice, I would show that there was water added, particularly in the first batch at 8:30 a.m., which resulted in approximately .38 per cent dilution.

That the raw juice and the juice as later tested in the cans shows, also, that the oil in the juice as canned when tested ranged from .05 per cent, .023, .032, .0325 per cent, .04 per cent, and to .06 per cent oil.

Pages 523 and 524 would show approximately 42 per cent water added, that is beginning at 7:30 p.m., which was unsweetened orange juice, single-strength orange juice.

Page 569, I offer to show and I believe the witness will testify that the batch tested at 10:00 p.m. represented over .60 dilution of the extracted juice.

On page 1353 and page 1354, I would offer those to show and the testimony of the witness to show that the records there related to processing of grapefruit, and that the records show that the grapefruit juice as extracted was [3085] substantially diluted by the addition of water before it was put in the cans and there tested.

In Exhibit I-2, I would expect to make similar showings with respect to the watering of grapefruit from pages 1356, 1360, 1361, 1364, 1392, and 1394,

for various dates between January 4, 1950, and February 7, 1950.

The same exhibit, on page 1407, I would use the document and the testimony of the witness to show that there was added to the raw juice in the tanks citric acid to increase the acidity.

On page 1528, volume I-3, and by the testimony of the witness, I would show that on August 8, 1950, citric acid was added to orange juice, single-strength orange juice, so that the acidity which in the raw juice form averaged approximately .85 per cent of acidity, went to an acidity in the canned product averaging approximately 1.15 per cent acidity, and that that was product designed on the face of the exhibit as being unsweetened orange juice.

I-4, page 738, July 19, 1951, would show that five tankfuls of single-strength orange juice were extracted and canned, and that there was added water to bring the acidity of the raw juice from acidity ranging up to 1.53 per cent acidity down to an average of 1.18.

That on the following page, 739, under the date of July 20, 1951, were canned seven tanks of single-strength orange [3086] juice, six of them being canned in five and a half ounce cans, and that through the addition of water, the acidity was reduced from an average of approximately 1.45 per cent acidity down to an average of approximately 1.08 per cent, by an addition of approximately 33 per cent of water.

Those are illustrative of and include matters which I would show from these documents and from the testimony of the witness now on the stand.

The Court: In other words, those are only part and you would show more?

Mr. Strachan: I could show more. I want to say, your Honor, that were these documents admitted in evidence, I would have another witness, the chief chemist of Exchange orange Products, testify to his circumspection of these books and his conclusions therefrom, which would show on an over-all basis what these records indicate to be the regular and normal dilution of orange and other citrus products of approximately 25 to 30 per cent.

The Court: All right. To the offer of proof, may it be stipulated there are the objections heretofore made?

Mr. Dixon: Yes, your Honor.

The Court: The objection is sustained upon the grounds heretofore stated by the court.

Bring the jury down.

(The following proceedings were had in the hearing and [3087] presence of the jury.)

The Court: The record will show the jury present and in their proper places.

Ladies and gentlemen of the jury, the court now strikes from the record all testimony of the witness Opal Smith and all references to Exhibits I-1, I-2, and I-3 and I-4. You will forget that the witness ever appeared or testified.

I am going to shorten this trial and we are going to get done with it some day. [3088]

* * *

The Court: Let the record show the jury absent.

Mr. Strachan: If the court please, I have in the courtroom a person called as a prospective witness, Frank Gilbert, whose testimony in some respects would be similar to that of the witness Smith. I would like to outline in the nature of an offer of proof what I would expect him to testify to, and perhaps we can dispose of that.

He would testify that he is now chief chemist of Cold Gold Company in La Habra.

That he was chief chemist and part-time superintendent of the plant for Winckler & Smith between the years 1945 and 1953.

That he was the direct supervisor over the witness Smith, Opal Comstock Smith.

He would explain the testing processes and the maintenance of records as they were explained by the witness Smith, and would have been explained in the proof which I offered through her.

He would have testified that the raw juice was first tested, that there then was added water and sugar in the raw juice tanks, in order to make the contents conform to a predetermined acidity, solids, and content.

That the resultant product after the additives had been put in the tanks was then tested to see that it corresponded to the prescribed formula. [3089]

That then the material in the tank was canned,

and that the cans were tested, and the results then recorded as indicated on the exhibits and as explained by the witness Smith.

He would testify that substantial quantities of water were regularly added to single-strength orange juice, as well as all other citrus products. That in addition to water, if necessary, citric acid in solid form, in crystalline form, would be added.

The same applied to sweetened juices of all kinds, and to grapefruit and blends of citrus fruits.

He would also testify that he was chief chemist at the time in 1947 when Exchange Orange Products had some hot concentrate processed at their plant, at the Winckler-Smith plant; that in part the product was not sterile, that it had black spots and had unstable cloud, and that the performance of that arrangement was not satisfactory to Mr. Finley.

The Court: The objection is on the grounds heretofore stated?

Mr. Dixon: The objection is on the grounds previously stated.

The Court: The objection to the offer of proof is sustained on the grounds heretofore stated by counsel, and by the court on the other matters.

Mr. Strachan: One other fact that the witness would testify: That the check mark or V mark appearing at the foot [3090] of many of these pages, and for identification I will refer to——

The Court: Pick out one as a sample.

Mr. Strachan: I am looking at 1489, which is June 26, 1950, there is a mark immediately to the left of the printed portion, "Prepared by," and

that scrawl, and similar scrawls appearing on various of these sheets, are marks made by Mr. Winckler to indicate that he had seen the report. That in the regular and ordinary course of business these daily reports were daily placed on Mr. Winckler's desk for his inspection.

The Court: All right. The same objection?

Mr. Dixon: The same objection.

The Court: The same ruling. [3091]

* * *

The Court: The record will show we are here without the jury.

In the transcript yesterday, I was reading some of my remarks, and there is an error or two. On page 3069, line 18:

"Now, the obvious purpose of this evidence is to bootleg into the agreement after-knowledge which the defendants did not have."

I can't guarantee I said "record" but that is what I obviously meant. It should be "into the record."

On page 3070, line 19:

"Part of it is this attempt to put into evidence these exhibits to show definitely after-acquired knowledge which defendants did not have at the time when"——

And it appears "there were requests for admissions." I suppose what was said was "requests for agreements." I will just change "admissions" to "agreements."

On page 3071, line 24:

"You have mentioned that Finley made a decision, and he had heard." [3095]

It should be, I suppose, "on what he had heard."

I will just change that.

All right, now what have you?

Mr. Strachan: There are several matters I want to mention, your Honor. One is that overnight I have been thinking over the ruling that you made on the general subject of whether we could show adulteration of product. I don't want to reargue any of the matters I mentioned yesterday, but I do want to say in addition that I regard the evidence of the fact of adulteration of product as being highly important to the issues as a matter of law in this regard. That you have the general rule that a person who is conducting himself or is engaged in a business that is illegal or contrary to public policy cannot sue to recover damages to that illegal business or the interference with his continued course of conduct against public policy.

The rule in antitrust is stated in the Commerce Clearing House Trade Regulations Service that no recovery can be had for violations of the antitrust laws if the business or property injured is inseparably connected with an enterprise the existence of which is abhorrent to public policy.

The evidence that was tendered through the witnesses and in the Exhibits I-1 through I-4 would show that substantially all of the product that was being sold by the Winckler-Smith organization was adulterated and was not produced in compliance

with the Food and Drug Act and the regulations applicable. [3096]

There is a decision in the Southern District of New York, which I haven't been able to locate, which applies the same rule, in a suit on contract.

And in the case of Maltz vs. Sax, 134 F. 2d, page 2, the Court of Appeals for the Seventh Circuit held that a manufacturer of gambling devices could not recover treble damages for injuries to his business resulting from a conspiracy alleged to be in violation of the antitrust laws, because the remedies under the antitrust laws did not extend to businesses that were conducted in violation of law or contrary to public policy.

I think that principle is fully applicable in this case.

It seems to me that the case is analogous to, say, a person dealing in bootleg or untaxed liquor. If his supplier discriminates against him in price and he goes out of business, it seems to me that he certainly cannot recover damages sustained by him in the course of conduct of an illicit occupation.

It may be that, as your Honor suggested in this case, the bootlegger made a product that the buying public was very well satisfied with, but still it is an illegal product, and the product of the Winckler & Smith plant, as our evidence will show, was likewise an illegal product.

I want to mention that as an additional basis for our having tendered the evidence. [3097]

I think, also, that the general doctrine of unclean hands would preclude a recovery here.

So it seems to me on a legal basis the facts that we sought to adduce are highly relevant, if not strictly controlling as a matter of law in this case.

The Court: Does that complete the additional matter?

Mr. Strachan: Yes.

The Court: There are two very ready answers to what you have said. One of them is an answer that attention should have been called to yesterday. That is Rule 12 of the Federal Rules of Civil Procedure. 12(b):

"Every defense, in law or fact, to a claim for relief," and so forth, "shall be asserted in the responsive pleading thereto * * * except * * *: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party."

And (h) of the same rule is the waiver of defenses that are not presented.

I think clearly within that rule a defense of illegality or a defense of unclean hands would have to be pleaded.

Let me add, also, that I don't think it comes within [3098] the provision of failure to state a claim, because the claim is stated.

If it turns out that the claim is not properly in court because of illegality or unclean hands, it would have to be pleaded.

Now, secondly, while we were waiting for this

case to go to trial I made a list of issues, I went over the pleadings, I heard a lot of argument, and I made a list of 17 issues, which I then discussed with counsel. And I thought, and I think we all agreed, that I had covered the substantial issues in the case. There may be a lot of minor evidentiary matters that might come up, but the major issues in the case were discussed in that memorandum. I went over the thing with counsel, and we had discussion on a number of them, and no question like this was ever raised.

True, Mr. Hurd, in his opening statement made some statement to that effect, but you don't demark your issues by an opening statement, particularly where there has been time spent on discussion.

So I think on both of those grounds the additional showing you make now adds nothing, and I am content to rest on the record as it now stands.

Mr. Strachan: Well, I suppose the question that your Honor has raised in regard to pleading might in part depend on whether this is an affirmative defense or whether it is [3099] a defense in law that when it appears from the evidence or in any other way the court should recognize it, in order that there will not be—and this is the first time the pleading matter has been called to my attention——

The Court: This wasn't an unexpected defense from what I heard yesterday. These records were obtained very early, and apparently it was the intention of the defendants to raise this defense early in the case. No place in the record have I heard anything about it until yesterday.

Mr. Strachan: I want to consider whether we shouldn't make a motion to file an amended pleading to clear up the procedural point.

The Court: You may consider the matter.

Mr. Strachan: Now, another matter along the same line, your Honor. I have a witness Higbee who is the chief chemist of EOP. I had intended along this line to make an extensive showing as to what his examination of the books disclosed. I would like to use Mr. Higbee, and what I propose to do, unless your Honor wants me to follow another course, in brief, is this:

I would put Higbee on the stand and have him testify as to his qualifications by education, his qualifications as a food chemist in the employ of the Department of Agriculture for a time, his subsequent employment as a chemist by EOP, his experience of some 30 years in that employment——

The Court: Are you now making an offer of proof?

Mr. Strachan: I am just outlining what I propose to do.

And then have him mention that he made analyses of the hot concentrate that was packed in 1947 by Winckler-Smith, a considerable part of which was not usable. What he found in that respect. And then I would go on and ask him if based on his training and his knowledge of chemistry as applied to citrus products there are formulae or methods by which if he were to be given the acidity and Brix ratio of the juice extracted and the acidity and the Brix ratio of the product as canned, he could compute

to what extent there had been additions of water, citric acid, or sugar, as the case might be.

I would have him testify that he could make such computations, and he would identify his formula, and I would then ask him if he had made an examination of Exhibits I-1 to I-4, and if there were no objection I would ask him what his examination disclosed [3101]

The Court: Well, I want it done out of the presence of the jury as an offer of proof. From what you have outlined here, I would sustain an objection to it and, therefore, it has no place before the jury.

Mr. Strachan: That is what I wanted your Honor's advice on. [3102]

* * *

The Court: Any witness that fits in the category of this chemist who I told you to make an offer of proof on, [3113] I want offers of proof made outside the presence of the jury.

As to the matter of the comparability of the Winckler & Smith plant with TreeSweet, it may or may not be admissible. If it is admissible, it is on the question of damage and not upon the question of what Sunkist knew about the plant, unless you have some foundation there.

Mr. Strachan: It will also be rebuttal as to Winckler's testimony that his operation and product was comparable to TreeSweet.

Mr. Dixon: His operation was comparable?

Mr. Strachan: Yes.

The Court: I don't think there is any issue of comparability of operations.

Mr. Strachan: He said his products were similar.

We are also going to show that the yield of juice that was obtained by Winckler & Smith per ton was not comparable to that obtained by TreeSweet, which of course would bear on damages.

Mr. Dixon: Unless that testimony, counsel, is directed to some specific part of Hodge's statement or evidence, I would necessarily have to object to it, because I don't see how you could make that kind of comparison between TreeSweet's plant and the plaintiff's plant. It is not an issue in this case. The issue is what could the plaintiff have done had they had 12,000 tons—had they had oranges available to [3114] them, whether it is 12,000 or 15,000 tons, under terms comparable. That is the only question; not whether they would produce less or more.

The Court: It may be that what the yield of Winckler & Smith is would be admissible on the question of damage.

Mr. Dixon: You mean whether Winckler & Smith could have produced——

The Court: Supposing they couldn't have produced any orange juice?

Mr. Dixon: Sure, that would be relevant. If they had no plant.

The Court: It is a matter of degree. But we will cross those bridges.

All right. We will get started.

(Whereupon the proceedings were resumed within the presence of the jury as follows:)

The Court: The record will show the jury present in their proper places.

Mr. Strachan: Mr. Rodgers.

WILLIAM RODGERS

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: William Rodgers. [3115]

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr. Rodgers?

A. I live in Riverside.

Q. What is your present occupation?

A. I am a salesman with an industrial adhesives company.

Q. Have you at any time been employed in the citrus fruit processing industry? A. Yes.

Q. When was your first employment in that industry? A. In June of 1942.

Q. By whom were you then employed?

A. TreeSweet Products Company.

Q. How long did you continue in the employ of the TreeSweet Company?

A. About seven and a half years. I left in October of '49.

Q. October when? A. Of 1949.

Q. Will you tell us briefly what your various

(Testimony of William Rodgers.)

positions and duties were while you were an employee of TreeSweet?

A. Well, I worked in most of the positions in the plant. I was in the control lab a good deal of the time when I first went there; I was in charge of the by-products department for about two years; I managed our Phoenix cannery in the 1945 [3116] season, and packed grapefruit juice there; and in 1949 I went to Florida with a great many of the other men, and I was in charge of the actual supervision of the running of the cannery in Fort Pierce, Florida.

Q. You were an assistant superintendent for TreeSweet, were you not?

A. That is right.

Q. Did you have a complete familiarity with their processing methods and the products they produced? A. I had.

Q. Were you ever employed by the Winckler-Smith Citrus Products Company? A. I was.

Q. During what period were you employed?

A. From April, 1950, to some time in September of 1950.

Q. What were your duties while you were employed by Winckler-Smith?

A. Well, I guess you would call it plant superintendent. I had the responsibility of the physical operation of the plant, seeing that help was there for the various jobs, and I helped Mr. Gilbert schedule production and see that the various inventories were kept up on raw materials.

(Testimony of William Rodgers.)

Q. What would you say was the condition of the Winckler-Smith plant mechanically when you were employed there?

Mr. Dixon: I object to that question, your Honor, as [3117] being entirely too general and broad in nature, the condition of the plant.

The Court: It is a preliminary question and will be further gone into. Objection will be overruled.

This testimony is admissible for one purpose and not for another. Let me see if I can explain it to you.

Winckler & Smith claims damages, and you are entitled to find out generally about their plant. We are interested particularly in the year 1951 when Winckler & Smith claim they were injuriously affected by the TreeSweet and Silzle contracts.

In determining, therefore, what Winckler & Smith could have done, you are entitled to know whether this was a 100 per cent efficient plant or five per cent efficient plant, as it may have some bearing on your decision on that issue, if you reach that issue.

The evidence is not admissible as to whether Sunkist properly or improperly refused to give a similar contract to Winckler & Smith, unless there is evidence that Sunkist knew of the things that this witness is going to testify to.

Do you follow me on that?

In other words, on the issue of Sunkist's refusal to give a comparable contract, that refusal has to be charged, if you find such a refusal, on the basis of

(Testimony of William Rodgers.)

what the man who made the refusal knew at the time he made the refusal; not what he [3118] might have found out afterwards from this witness, or some other witness.

The objection is overruled.

The Witness: Will you restate your question?

Mr. Strachan: Will you read the question, please.

I will put another one.

Q. (By Mr. Strachan): What did you observe about the physical condition of the Winckler & Smith plant?

A. Generally speaking, it was in quite bad shape mechanically.

Q. How did it compare mechanically with the TreeSweet plant?

Mr. Dixon: If the Court please, I think that answer should be stricken as clearly the conclusion of the witness, that it was in bad shape mechanically.

That is a question for the jury to decide based upon the facts, if any, that this witness can give to them.

The Court: The objection is sustained and the answer is stricken out, and the jury is instructed to disregard it.

Q. (By Mr. Strachan): Now, will you mention specific respects in which the plant was not in good condition?

Mr. Dixon: If the Court please, I am going to, at this point, object to counsel leading this witness.

(Testimony of William Rodgers.)

The Court: Sustained.

Q. (By Mr. Strachan): Will you tell us what you observed [3119] about the plant with respect to its mechanical efficiency?

A. Well, at the time I went there the plant had been operating, and I found that the machinery, equipment, that was necessary to transport either juice or cans, or material of one nature and another, was in a condition of repair which made it necessary that the equipment be overhauled quite frequently to keep the plant running.

Q. How did that compare with the mechanical conditions of the TreeSweet plant?

Mr. Dixon: I object to that question, your Honor.

The Court: Objection sustained. We are not trying the issue as to what the TreeSweet plant did or did not do. [3120]

Q. What kind of equipment was being used for your extraction of citrus juices?

A. The Citromat extractor.

Q. In regard to the efficiency of the Citromat extractor as compared with other types of extractors—no. I will change that.

Can you tell us whether or not Citromat extractors were comparable in the production of single-strength Valencia juice with other types of extractors then used in the industry?

Mr. Dixon: If the Court please, I think I must object to that question, too. The evidence here is that this was a Citromat extractor. If this witness

(Testimony of William Rodgers.)

can testify there was anything wrong with it, that might be relevant.

The Court: I think the defendant would be entitled to show that this might not be the latest equipment. It is a question of fact for the jury whether or not a man who is operating a 1953 car is operating one that is as good as a 1954 or 1955. I suppose progress is made in equipment the same as it is made in automobiles. But I think you ought to go about it the other way. Inquire first what type extractors were used, a brief description of them, and then what was used by the others.

Mr. Strachan: All right.

Q. Will you tell us what other type extractors were [3121] used for the production of single-strength Valencia juice during the period when you were in the employ of Winckler-Smith Company?

A. Well, that was the only type that we had in operation.

The Court: Was there available——

The Witness: You mean the others in the field that they could have had?

Mr. Strachan: Yes.

The Court: You were there in 1950?

The Witness: Right.

The Court: At that time Winckler & Smith had what you call a Citromat?

The Witness: Yes.

The Court: What is a Citromat?

The Witness: Well, a Citromat is an extraction machine which cuts the fruit in half and its extrac-

(Testimony of William Rodgers.)

tion is due to pressure applied by rolls. As the halves of the fruit are run through the extractor, it has pressure exerted on it and that squeezes the juice out.

The Court: Was this a special machine made for the juice industry?

The Witness: Yes, it was.

The Court: And at that time, in 1950, were there later models of Citromats, or was there a different type machine [3122] that could also be used?

The Witness: There were two other major types of extractors available at that time. There was one manufactured by Food Machinery & Chemical Corporation, and the one manufactured by the Brown Citrus Machinery Company.

The Court: And their general purpose was to do the same thing that Citromat did?

The Witness: That's right.

The Court: Did they do it more efficiently?

The Witness: Very much more. I should qualify that in this way. The Citromat, being a crushing type of extractor, would crush out all of the oil and the peel juices and everything else into the juice. There was no means of segregating them. The other one——

Q. (By Mr. Strachan): I was going to ask you what the procedure with the other machines was.

A. Well, Food Machinery's citrus juice extractor was one in which the juice was always separate from the peel by means of an intermeshing finger extraction and pressure arrangement, which is a

(Testimony of William Rodgers.)

little difficult to describe. It probably had the highest quality juice of any of the extractors at that time.

The Brown, so-called Brown machine, was one which utilized the principle of the reamer, in which half of the fruit had a reamer working at high speed, and the juice was reamed [3123] out, but for the most part the peel and the juice were kept separate, which was not the case in the Citromat.

Q. Now, will you describe the difference between the juices by Citromat and those by the other processes?

Mr. Dixon: I object to that question, your Honor. I don't think that is material to any of the issues of this lawsuit as to what is produced by other machines.

The Court: How much time are you going to spend on this?

Mr. Strachan: Very little.

The Court: Overruled.

Tell us generally what the difference was.

The Witness: The Citromat juice would always be higher in oil than either the juice from the other two extractors, what was sometimes referred to as peel extractives, in other words, things you would get out of the peel by crushing it. You can get a good deal of water out of it that isn't properly considered juice.

Q. (By Mr. Strachan): Then which machines produced the higher quality single-strength juice?

Mr. Dixon: I certainly object to that, your Honor, higher quality.

(Testimony of William Rodgers.)

The Court: Sustained.

Q. (By Mr. Strachan): Now, with regard to the amount of single-strength juice of marketable quality that is extracted [3124] how did the Citromat machine process compare with the other two you have described?

A. Well, quality for quality——

The Court: He is talking about the amount of juice. You said quality.

The Witness: I thought he mentioned merchantable quality.

Will you restate the question, please?

Mr. Strachan: I will have the reporter read it.

(Question read.)

Mr. Dixon: I certainly object to the form of that question, your Honor.

The Court: Sustained.

Q. (By Mr. Strachan): Can you tell us how the amount of juice per ton, single-strength juice, extracted by the Citromat process compared with described?

the quantity extracted by the other method you have

A. Well, the Citromat would not extract as much juice from a given ton of fruit of a quality of juice which would be considered one which we would use in single-strength purposes.

Mr. Dixon: If the Court please, I object to the insertion by this witness of something which obviously is not an answer to the question. I don't like to be objecting, but——

(Testimony of William Rodgers.)

The Court: That part of the answer after "would not extract [3125] as much juice," after that the answer may go out.

The Citromat didn't produce as much juice as the later model machines?

The Witness: Yes, that's right.

Q. (By Mr. Strachan): Did you ever discuss with Mr. Winckler the advantages that might be gained by installing in the place of Citromats these other methods of extraction or machines for extraction of juice? A. I did.

Q. And on those occasions what did Mr. Winckler say to your suggestion?

Mr. Dixon: Now, if the Court please, I don't like to be objecting——

The Court: Make your objection.

Mr. Dixon: I object to the form of the question on the ground it is wholly irrelevant and immaterial to the issues to which this testimony is apparently directed.

The Court: Sustained. We are not concerned with whether Mr. Winckler for one reason or another did or did not put in the latest type equipment. We are only concerned with what equipment he had in there. There has to be some end to the issues injected in this case.

Q. (By Mr. Strachan): After you left the employ of Winckler & Smith, what was your occupation?

A. I worked with the Food Machinery & Chemical Corporation [3126]

(Testimony of William Rodgers.)

Q. And in what capacity were you with them?

A. Sales engineer.

Q. In that work did you have occasion to call on the citrus fruit processors in and about the Los Angeles area? A. I had.

Q. Did you have an opportunity to familiarize yourself with the manufacturing processes, the machinery that they employed in those manufacturing processes? A. I did.

Q. Did you have occasion to call on the Winckler & Smith plant after the time when you were employed by Winckler & Smith? A. I had.

Q. And you continued to call on them down to the time of the reorganization under Chapter X when the trustee was in possession, is that correct?

A. Yes.

Mr. Dixon: If the Court please, I object to this question.

The Court: I don't know what it is going to be.

Mr. Dixon: I don't, either.

The Court: Overruled. He said he did.

Q. (By Mr. Strachan): Are you able to tell us, based upon your experience in that field, whether it was general [3127] practice to use Citromat machines in the production of first quality single-strength juice in Southern California?

Mr. Dixon: I must object, your Honor, to the insertion of the words "first quality" by counsel.

The Court: Don't apologize. Make your objection.

Mr. Dixon: I object to the form of the question.

(Testimony of William Rodgers.)

The Court: What is the basis of your objection?

Mr. Dixon: That it calls for a conclusion of the witness. The insertion of the words "first quality" has not been defined. It might mean anything to the witness. Orange juice is all right.

The Court: I will sustain the objection. In my opinion the ground for the objection, however, is that we are not concerned with a comparison with other processors. If we did that, then we would have to have described in great detail what each plant had and how Winckler & Smith compared with that. Then we would be here another month.

Mr. Strachan: That's all.

Cross-Examination

By Mr. Dixon:

Q. Mr. Rodgers, you were contacted, were you, by someone from the defendants at some time prior to your appearance here in this case in this court room? A. I was. [3128]

Q. When were you contacted and by whom?

A. Oh, it was two years ago, I believe.

Q. Do you recall who contacted you?

A. Mr. Chalkley.

Q. I did not get the name.

A. Mr. Chalkley

Q. Can you tell the jury who Mr. Chalkley was?

A. I don't know. He is one of the gentlemen in this litigation, is all.

Q. Did you know him before he contacted you?

A. No.

(Testimony of William Rodgers.)

Q. What did he say when he contacted you at that time?

A. Well, we just discussed the generalities about the situation. He was just——

Q. I want you, if you can, to be specific as to what he said in substance when you first saw him as to why he was contacting you.

A. Well, he came out to see me and he just asked a few general questions about how long I had worked for Mr. Winckler, and I can't remember anything very specific about it because it is quite a long time ago. His visit was rather short.

Q. And that is the only time that you saw him?

A. Well, up until I saw him the other day.

Q. All right. Mr. Rodgers, you left TreeSweet in October, 1949, did you? [3129] A. Yes.

Q. Did you leave there voluntarily?

A. Yes.

Q. What were you doing between October, 1949, and the time that you were employed by the plaintiff in April, I believe you said, 1950?

A. I had a real estate business in Balboa.

Q. And you gave that up to go with the plaintiff, that is, Winckler & Smith?

A. I had sold the business, yes, shortly before I went with Mr. Winckler.

Q. You were with the plaintiff for a period of about five months in 1950, is that correct?

A. That's right.

Q. You left about the first of September, 1950, is that correct?

(Testimony of William Rodgers.)

A. Some time in September.

Q. That was during the processing season for Valencias?

A. Well, it was getting along toward the end of it, yes.

Q. You left voluntarily, I take it?

A. Mr. Winckler and I, when I went in there—his foreman had left or superintendent had left and I was there to cover the summer months. That was the understanding we had. [3130]

Q. In other words, you were only to be there temporarily in any event, is that correct?

A. Yes, that's right, during the major part of the production season.

Q. You mentioned the Citromat extractor as being used by Winckler & Smith. Sunkist uses the Citromat extractor in its processing plant, doesn't it?

A. That is correct, but not in the single-strength juice plant.

Q. But it has used it for extracting juice from the oranges? A. Yes.

Q. Now, when you went with Food Machinery, you represented it as a salesman. Can you tell the jury whether Food Machinery sells or leases its equipment to those who want it?

A. They lease their equipment, the extraction equipment, that is.

Q. So that that kind of equipment can't be purchased from Food Machinery? If you want it, it has

(Testimony of William Rodgers.)

to be leased? A. That's right.

Q. And there is a royalty arrangement under that kind of a lease, isn't there?

A. That's right.

Q. In addition to the rental?

A. That's right. [3131]

Q. Do you know anything about the Brown Machine Company, I think you mentioned?

A. Yes.

Q. Their arrangement is the same, is it not?

A. That is correct.

Mr. Dixon: I think that's all.

Redirect Examination

By Mr. Strachan:

Q. Did TreeSweet use Citromats?

Mr. Dixon: If the Court please, I object to that question. It is not direct examination——

The Court: I almost stopped you. If you had asked another question, I would have stopped you, but you asked one. I will let Mr. Strachan ask the same question as to TreeSweet. Overruled.

The Witness: TreeSweet did not use Citromats.

Q. (By Mr. Strachan): Citromats are extracting machinery that is taken on a lease basis, too, is it not? A. That's right. [3132]

Q. So neither Citromats—what is the other one?

A. Brown Machine.

Q. Both of them are taken on a lease basis, is that correct? A. Yes.

(Testimony of William Rodgers.)

The Court: Did Winckler & Smith own this Citromat, or was it a leased machine, if you know?

The Witness: At that time they were leased from the Bireley company.

Mr. Strachan: I would like to talk with you and Mr. Dixon and the reporter, your Honor, before this witness leaves the stand.

The Court: Come forward.

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: This witness would testify, if I asked him, and I offer to have him so testify, that during the time that he was employed by Winckler & Smith he observed that the single-strength juice that was produced was stretched by the addition of water and other additives to the extent of approximately 20 per cent. That when he recommended to Mr. Winckler that he obtain more efficient extracting machinery than the Citromats, Winckler said that he didn't see that he needed to do it, as long as he could make up for the deficiency by the addition of water. [3133]

The Court: Objection upon the basis as heretofore stated?

Mr. Dixon: Yes.

The Court: With reference to the testimony of Opal Smith and Frank Dobert?

Mr. Dixon: Yes.

The Court: Objection sustained.

(Whereupon the proceedings were resumed within the hearing of the jury as follows:)

The Court: Is that all, Mr. Strachan?

Mr. Strachan: That is all, your Honor.

The Court: Thank you, Mr. Rodgers. You are excused.

RICHARD BYLIN

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Richard Bylin.

Direct Examination

By Mr. Strachan:

Q. Mr. Bylin, I understand that you are having some difficulty with your voice, but try to raise it so that it can be heard.

Where do you live?

A. In Corona.

Q. By whom are you employed?

A. Exchange Lemon Products Company. [3134]

Q. In what capacity are you employed?

A. I am their internal auditor.

Q. In that capacity you supervise the auditing procedures that are conducted by a staff under you?

A. Yes.

Q. During the time that Exchange Lemon was a party to this litigation, that is before its dismissal, you were engaged, were you not, in certain activities compiling data for use in this litigation?

(Testimony of Richard Bylin.)

Mr. Dixon: Now, if the Court please, I move that the question of counsel be stricken from the record.

The Court: The objection is overruled, but let's not have any misunderstanding.

Exchange Lemon was at one time a party defendant. Now it is not a party defendant, but it is alleged to be an alleged co-conspirator in the case.

In all practical effects, except one, it is still in the case. The only thing is that no judgment can be rendered against Exchange Lemon. However, it is still in the case as far as availability to plaintiff to prove what it would have proved or might have proved had Exchange Lemon still been a party defendant.

(The question was read by the reporter.)

The Witness: Yes.

Q. (By Mr. Strachan): Did you in that connection make [3135] an analysis of the invoices for products, certain products sold by Winckler & Smith during the calendar year 1949 as compared with the calendar year 1950? A. Yes.

Q. What classes of products did you deal with in that analysis?

A. Valencia orange juice, sweetened and unsweetened.

Q. Now, will you tell us what you did in making the analysis, what data you compiled and what use you made of it?

A. We made a list of customers who purchased Valencia orange juice in 1949, and a list of the cus-

(Testimony of Richard Bylin.)

tomers who purchased those same products in 1950, and compared the two lists to determine those customers which appeared on both and those customers which did not appear on the lists of both years.

Q. Now, can you tell us how many total customers you counted in the year 1949 for Valencia orange juice?

Mr. Dixon: Are these customers of Exchange Lemon?

Mr. Strachan: No. These are customers of Winckler & Smith.

Mr. Dixon: I don't understand. How would this—well, all right.

The Court: Apparently vouchers of Winckler & Smith——

Mr. Strachan: Invoices.

The Court: ——invoices were made available to you, and you made some study of them? [3136]

The Witness: That is correct.

Would you restate the question to me, please?

Q. (By Mr. Strachan): Will you tell us how many customers for Valencia juice you found from the invoices for the year 1949?

A. There were a total of 708.

Q. Now, of those 708, how many did you find had in the following year also purchased Valencia products from Winckler & Smith? A. 93.

Q. So that the repeating customers represented what percentage of the total of the 1949 customers?

A. Approximately 13 per cent.

Mr. Strachan: That is all on direct.

(Testimony of Richard Bylin.)

Cross-Examination

By Mr. Dixon:

Q. Just one or two questions, Mr. Bylin.

I am not sure I understand your testimony from the questions that counsel put to you.

You talked about some invoices that you got in 1949 and '50?

A. Covering those years. I didn't actually receive them in those years.

Q. In other words, you took some records that were made available to you as a result of the discovery in this [3137] case, and analyzed them, and with the results that you just indicated; is that correct? A. That is correct.

Q. And you are the internal auditor for Exchange Lemon Products Company?

A. Yes, sir.

Mr. Dixon: That is all.

Mr. Strachan: No redirect.

The Court: You may step down. Thank you.

Mr. Strachan: Mr. Smith, please.

ARVEL SMITH

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Arvel Smith.

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr. Smith?

A. In Ontario.

Q. By whom are you employed?

A. The Exchange Orange Products Company.

Q. How long have you been employed by that company? A. Something over 18 years.

Q. In what capacity are you employed?

A. As the comptroller and assistant secretary.

Q. Have you prepared certain schedules showing statistical data concerning the citrus fruit products in the United States, California and Arizona territory, and the Sunkist portion, with respect to various commodities? A. Yes, I have.

Q. There has been marked for identification as Exhibit CE——

The Court: How many of these have been marked?

The Clerk: I have marked a total, your Honor, of CE through CK, for identification, a series of charts. [3139]

* * *

The Court: Can't we save a lot of time on these with a general statement of the calculations?

(Testimony of Arvel Smith.)

Mr. Strachan: I think we can, your Honor.

Mr. Dixon: I certainly have never seen these exhibits before, counsel, but go ahead. It is statistical information.

Q. (By Mr. Strachan): Referring to all of these exhibits, CE, CF, CG, CH, CI, CJ, those are statistical data, are they not, prepared by you or persons working under your direction and supervision? A. They are. [3140]

* * *

The Court: Can't we do this? Can't we stipulate that as to the figures taken from the Government reports there is no objection; as to figures taken from Sunkist records which were reported to the Government there is no objection? [3141]

Mr. Dixon: That is correct.

The Court: That as to figures that the witness took from Sunkist's records, which were not reported to the Government, that you would stipulate that the witness, if he testified, would testify that these were the figures?

Mr. Dixon: Yes.

The Court: I am not asking you to stipulate that the figures are correct, but I am asking you to merely stipulate that the witness would so testify.

Mr. Dixon: Yes, that is all right, your Honor. That will save considerable time. [3142]

The Court: Is that satisfactory?

Mr. Strachan: Entirely satisfactory, your Honor.

(Testimony of Arvel Smith.)

The Court: So in this manner you have drawn up these various statistical figures and charts, CE to CK, inclusive, the last of which was a chart and the rest were statistical figures. They involve various subject matters. But that is the way you drew them up?

The Witness: That is correct.

The Court: You would testify, you are under oath, that the figures you got from EOP or Sunkist that were not reported were correct figures?

The Witness: That's right.

The Court: And the various charts involve different matters. CE is headed, "Single-Strength Blended Orange and Grapefruit Juice." It does not include pure orange.

The Witness: No.

The Court: That is just blended——

The Witness. Blended orange and grapefruit juice.

The Court: CF is headed, "Sunkist Percentage of Total California-Arizona Tonnage of Valencia Products Oranges." That is what that is related to?

The Witness: My exhibits aren't marked, your Honor, so I am having to check these.

The Court: Well, you look at mine. CF is "Sunkist Percentage of Total California-Arizona Tonnage of Valencia [3143] Products Oranges"?

The Witness: Yes.

The Court: CG is "Valencia Single-Strength Juice and Frozen Concentrate Production of Exchange Orange"?

(Testimony of Arvel Smith.)

The Witness: That's right.

The Court: This is limited entirely to what Exchange Orange produced and whether it went into single-strength Valencia or concentrate?

The Witness: That is correct, together with the Sunkist tonnage of the Valencia oranges.

The Court: CH is "Single-Strength Orange Juice Production." By that do you mean all production in the United States?

The Witness: That is correct.

The Court: And then the percentage produced by Exchange Orange?

The Witness: That is correct.

The Court: This would include both navel and Valencias?

The Witness: Yes, that's right. Some charts do not. That one does.

The Court: CI says, "Frozen Concentrate Orange Juice Production." That is limited to concentrate, but it involves the United States, California-Arizona, and the amount that EOP produced.

The Witness: Right. [3144]

The Court: And CJ is "California-Arizona Orange Juice Utilization for Single-Strength and 42° Brix Frozen Concentrate," right?

The Witness: That is correct.

The Court: This would be all oranges produced in California-Arizona, navel or Valencia, and what they went into, either single-strength or Brix, 42° Brix?

The Witness: That is correct. There is one dif-

(Testimony of Arvel Smith.)

ference there, your Honor, and that is on the frozen concentrate the gallons of raw juice used in frozen concentrate was multiplied by a factor of 4. The figure taken from the USDA report was multiplied by 4 to convert from frozen concentrate to the equivalent single-strength.

The Court: Also, when you say 42 Brix, did you have to make some computation to reduce a 60° Brix or a 39° Brix, in order to get a figure for 42?

The Witness: No. The government report is based on 42 Brix.

The Court: In other words, the company in making a report to the government converts whatever Brix they make to 42?

The Witness: If that is the type product the government is asking about. The government asks special reports for other Brix as well as 42.

The Court: Do you think this includes all Brix? [3145]

The Witness: No. This is just 42 Brix.

The Court: Just 42 Brix?

The Witness: The so-called household package of 42 Brix frozen concentrate.

The Court: Is that the little can you buy?

The Witness: That's right.

The Court: That is 42 Brix?

The Witness: 42 Brix.

The Court: So this is slanted at the amount of that product from California-Arizona?

The Witness: That is correct.

The Court: And CK is a chart in red and green,

(Testimony of Arvel Smith.)

and the red shows the amount of concentrate made in various years from California-Arizona, and the green shows the amount of single strength.

The Witness: That is correct.

Q. (By Mr. Strachan): Mr. Smith, in looking over the set I had marked, I think I omitted one that has to do with grapefruit. Do you have a copy of that here?

The Witness: There is one called single-strength grapefruit juice production.

Q. (By Mr. Strachan): Apparently those I brought over did not include that. Could I have your copy?

A. I have made some marks on it. I have another copy back there. [3146]

Q. Where can I get that?

A. Well, here it is. I have one.

Mr. Dixon: Counsel, I have an extra one that you gave me this morning. You can use that.

The Court: That would be CL.

(The exhibit referred to was marked Defendant's Exhibit CL for identification.)

The Court: What you said about these other exhibits, as far as where you got the figures, applies also to CL?

The Witness: That is correct.

The Court: And the stipulation as to those figures you took from EOP or Sunkist records, you would testify the figures are correct?

The Witness: That's right.

(Testimony of Arvel Smith.)

The Court: And counsel will stipulate, not that the figures are correct, but that you would so testify, right?

Mr. Dixon: Yes, your Honor, except that—well, I want to object to the introduction of any of these until I have asked some questions concerning some of them, because of the nature of the reports.

The Court: I am just trying to get a foundation laid, and so forth.

Mr. Dixon: Yes.

Mr. Strachan: I will offer the exhibits CE through CL, inclusive. [3147]

Mr. Dixon: Was this one on grapefruit marked?

Mr. Strachan: That is CL for identification.

The Court: I will reserve ruling.

Mr. Strachan: That's all on the direct.

The Court: You may cross-examine.

Cross-Examination

By Mr. Dixon:

Q. Now, with reference to all of the exhibits, CE through CL, Mr. Smith, you are aware, of course, of the fact that Exchange Orange has certain contracts with processors, independent processors, pursuant to which oranges are turned over to the processor for processing into citrus juice products, are you?

A. Yes, I am.

Q. Now, in reporting any figures that may be contained in any of these exhibits with reference to single-strength orange juice produced by Exchange Orange during any of the periods covered by this

(Testimony of Arvel Smith.)

exhibit, have you included and reported any amounts processed under any arrangements that you may have had during these periods with independent processors? Do you understand my question?

A. Yes, I understand your question.

Q. Can you answer that to the jury?

A. The production by Silzle and TreeSweet on the orange [3148] juice is not included. Production of the canned orange juice produced for the Exchange Orange Products Company by Exchange Lemon Products Company is included.

Q. I am sorry. I can't hear you, Mr. Smith.

A. The canned orange juice produced by Silzle and by TreeSweet——

Q. You are speaking now of the year 1951?

A. Of the year 1951.

Q. Yes.

A. ——are not included in this report.

Q. Which report are you talking about? Which exhibit, please?

A. It may be several of them, Mr. Dixon.

Mr. Strachan: Your exhibits are not marked?

The Witness: No.

Mr. Strachan: Why don't you use these, then?

Q. (By Mr. Dixon): Can you go over the exhibits from CE to CL and tell the jury——

The Court: Wait, before you do that. You didn't hear part of his answer. Let's get that straight. He said in certain of these exhibits production by Silzle and TreeSweet of the orange juice was not in-

(Testimony of Arvel Smith.)

cluded, but that production by Exchange Lemon for EOP was included.

Isn't that what you said?

The Witness: That is correct. [3149]

The Court: You don't have anything here about lemons, do you?

The Witness: No.

The Court: So, therefore, you haven't got anything about EOP production of lemons for ELP, if it existed?

The Witness: No. There is nothing in here about lemons.

The Court: Now, the question, Mr. Dixon?

Mr. Dixon: Do you want the question read again, Mr. Smith? A. Yes, please.

(The record referred to was read by the reporter, as follows: "Q. Now, in reporting any figures that may be contained in any of these exhibits with reference to single-strength orange juice produced by Exchange Orange during any of the periods covered by this exhibit, have you included and reported any amounts processed under any arrangements that you may have had during these periods with independent processors? Do you understand my question?")

The Court: That isn't the question. You asked him to point out the exhibits.

Q. (By Mr. Dixon): Referring to Exhibits CE through CL, Mr. Smith, will you tell the jury in which of those exhibits, if any, Exchange Orange

(Testimony of Arvel Smith.)

reported production of single strength [3150] to the government for the years referred to in said exhibits as to whether or not the figures so reported included the amounts processed by independent processors of oranges made available to them by Exchange Orange for processing into single-strength juice during the years in question? That is kind of a—do you understand my question?

The Court: I think you have two or three questions in one. First, let me ask this.

When Exchange Orange Products reported its production by by-products oranges, first, generally, did it report to the government agencies production for it under contracts which EOP may have had with Silzle, TreeSweet, Bireley's, and various of your processing contractors?

Mr. Strachan: May I raise a question about that, your Honor? It seems to me there are perhaps two things involved. You are talking about the products fruit which was available, and then talking about what was produced from the fruit I think that mixes two things up.

The Court: Maybe I did the same thing Mr. Dixon did. He had too many things. I will see if I can narrow it further.

In your reports to government agencies as to your processing activities, did you or did you not include the products processed by these companies with which EOP had contracts? [3151]

The Witness: In some instances they were re-

(Testimony of Arvel Smith.)

ported to the government and in other instances they were not.

The Court: Now, let's take this. In drawing these exhibits and in getting your figures which you used either from government reports or from EOP and Sunkist records, did you include the processing and the results of it as carried on by independent processors under contract with EOP?

The Witness: Some were reported to the government and some were not, your Honor. The basic difference was if the products were to be sold under the Sunkist or Exchange label, it was reported to the government. If it were going to be sold, eventually sold under the processor's own label or own distribution system, Exchange Orange did not report it to the government.

The Court: Now, we understand on the basis of which you make your report. Now, drawing up these exhibits E to L, those that might be involved in this, did you use the government figure based on whether you reported or not?

The Witness: We used the figure that we reported to the government.

The Court: Therefore, it would follow that you have not included in these exhibits the processing done by Silzle and TreeSweet where they took the product and sold it under their own name?

The Witness: That is correct. I believe in 1950 Silzle [3152] processed a little bit of blend and a little bit of grapefruit juice, and that was reported by us to the government because it came back to us.

(Testimony of Arvel Smith.)

The Court: Because they came back and were sold under your label?

The Witness: That's right.

The Court: But the contracts in the canning year of 1951, as I understand the record, all those products that were processed by Silzle and TreeSweet were retained by them under their option and sold under their own labels?

The Witness: That's right.

The Court: So you didn't report that?

The Witness: That is correct, we did not.

The Court: Which specific exhibits would be affected by that if, for instance, that was to be included?

You are interested, Mr. Dixon, just in TreeSweet and Silzle?

Mr. Dixon: Yes.

The Court: That wouldn't affect CE, would it?

The Witness: No, it would not, because that is a blend of orange and grapefruit juice.

The Court: What about CF?

The Witness: CF would have been affected.

The Court: CG?

The Witness: CG would have been [3153] affected.

The Court: CH?

The Witness: CH would have been affected.

The Court: CI, frozen concentrate.

The Witness: That would not have been affected.

The Court: Not by Silzle and TreeSweet?

The Witness: That is correct.

The Court: CJ?

(Testimony of Arvel Smith.)

The Witness: That would not have been affected, because that is completely from USDA reports.

The Court: USDA? What's that?

The Witness: United States Department of Agriculture marketing reports.

The Court: Well, would the United States Department of Agriculture have picked up the Silzle and TreeSweet production?

The Witness: I am presuming that TreeSweet and Silzle reported. In some years I am sure they did.

The Court: This being a total of everything in California-Arizona, you would assume that TreeSweet and Silzle were included in CJ?

The Witness: That is correct.

The Court: What about CK?

The Witness: CK, your Honor, is merely a pictorial presentation of the CJ. [3154]

The Court: And CL involves grapefruit and would not be involved?

The Witness: That would not be involved.

Q. (By Mr. Dixon): You are familiar, of course, Mr. Smith, with the fact that Exchange Orange had contracts with TreeSweet during the years '48, '49 and '50, are you not?

A. That is correct.

Q. Your answer would be the same with reference to reporting figures on single-strength juice to the Government for those years as you have stated for '51? A. Yes. [3155]

* * *

(Testimony of Arvel Smith.)

Now, Mr. Witness, on CF, -G and -H did you make a similar computation and in the column where you have "Sunkist tonnage," could you put "Sunkist tonnage," or whatever other column would be involved, plus TreeSweet and Silzle, and make a further computation?

The Witness: It could be done. It has not been done.

The Court: That is a question of fact for this jury to decide.

The Witness: Your Honor, on CF, under Sunkist tonnage, that includes the tons that went to TreeSweet and Silzle, because that is all of the Sunkist tonnage.

The only column that would be affected is the Sunkist tonnage into single-strength and frozen concentrate.

The Court: This column here (indicating)?

The Witness: That is correct.

The Court: What about your percentage?

The Witness: Your percentage, then, would automatically be affected.

The Court: You seem to be a fellow that likes figures and knows how to handle them, and you could do this job a lot easier than some of us could.

Mr. Dixon: If the court please, I would like to inquire concerning CF and CG further.

The Court: All right.

Mr. Dixon: Upon going back over them I have a couple [3156] of questions.

The Court: Go ahead.

(Testimony of Arvel Smith.)

Q. (By Mr. Dixon): Referring to CF, Mr. Smith, and the column headed Sunkist Tonnage into Single-Strength and Frozen Concentrate for Sale by Exchange Orange, you have certain figures there which I assume are tonnage figures. Does that column represent the total tons sold by Exchange Orange or Sunkist during the years in question, or what does that figure represent—that column represent?

A. That column represents the tonnage of fruit that Sunkist, through Exchange Orange, put into single-strength and frozen concentrate in those production seasons.

Q. In other words, that is the actual amount of tonnage of Valencia oranges that was processed by Exchange Orange, itself, into juice?

A. By itself and other processors that would have been processing, and which the juice would have been sold under the Sunkist and Exchange label.

Q. In other words, the tonnage figures in CF, in the column I have just mentioned, include the tons, for instance, that are processed by Exchange Lemon? A. That's right.

Q. For Exchange Orange?

A. That is correct.

Q. But it would not include, for example, the year '49, [3157] the tonnage that was processed by TreeSweet? A. That is correct.

Q. On its contract with Exchange Orange for that year? A. That is correct.

(Testimony of Arvel Smith.)

Q. And for the succeeding years?

A. That is right.

Q. Directing your attention to CG——

The Court: Which is Valencia single-strength juice and frozen concentrate production.

Q. (By Mr. Dixon): Yes, of Exchange Orange, you have the heading Tonnage into Single-Strength Juice for Sale by Exchange Orange, during the various years. Does that column and the figures thereunder, in tons, represent the tons of Valencia oranges processed by Exchange Orange during the years in question?

A. By Exchange Orange, and the processors as I outlined before. That is, those in which the juice was processed and came back and sold under our own company labels.

Q. Well, take the figure 1945-46, in which there is 30,379 tons under that heading, does that 30,379 tons represent the amount of tons of Valencia oranges processed in that year by itself, or Exchange Lemon, or any other processor that might have processed for Exchange Orange and turned the product for sale under the Exchange label?

A. If it were processed by a processor and the goods [3158] came back to us to be sold under our label, that is the complete tonnage of juice that went into single-strength juice.

Q. Yes. But there, again, the figures in the column I just mentioned do not include, for example, any tonnage that might have been processed under the TreeSweet contract? A. That is correct.

(Testimony of Arvel Smith.)

Q. Or Silzle in 1951?

A. Silzle in 1951, and TreeSweet in various other years.

Mr. Dixon: Thank you. That clears it up to my satisfaction.

Redirect Examination

By Mr. Strachan:

Q. See if I can clear it up to my satisfaction. As I understand it, the column——

The Court: Which one?

Q. (By Mr. Strachan): On Exhibit CF, that is entitled Sunkist Tonnage into Single-Strength and Frozen Concentrate for Sale by Exchange Orange, does not include the tonnage that was processed, say, by TreeSweet or Silzle, and sold by TreeSweet and Silzle through their own organization under their own brand, or under the private brands of their own customers? A. It does not include those tons.

Q. Because those were sales not made by Sunkist? [3159]

A. That is correct. And that is the way I developed the form.

Q. And that is true in -G and -H, wherever the column is headed with reference to sales by Exchange or sales by Sunkist, or sales by Exchange Orange; is that correct? A. That is correct.

Mr. Strachan: That clears it up to my satisfaction. Thank you.

The Court: I was going to ask the witness if he wanted to make a computation where he could put a

(Testimony of Arvel Smith.)

double total in on those, and maybe attach the other computation as CG-1, or something, to it.

Mr. Strachan: I think, your Honor, we would be getting into a different subject there. These were to deal with the extent that Sunkist or its components were competitors in the selling market.

The Court: This looks just to the selling market?

Mr. Strachan: That is what was dealt with here.

The Court: All right.

Are they offered in evidence?

Mr. Strachan: Yes, sir.

Mr. Dixon: No objection.

The Court: CE, CF, CG, CH, CI, CJ, CK, and CL, that is, CE through CL, inclusive, are received in evidence. [3160]

* * *

PAUL A. COVINGTON

called as a witness by the defendants, being first sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

* * *

Q. What is your business?

A. In the investment brokerage business, investment banking.

Q. What firm are you associated with?

A. Wagenseller & Durst, Incorporated.

Q. How long have you been associated with that organization? A. Approximately five years.

(Testimony of Paul A. Covington.)

Q. What position do you have with the organization? A. I am secretary-treasurer.

Q. Do you recall ever having conducted any negotiations with Mr. Nicholas Winckler, or Mr. Walker, or Mr. Rubin, or anyone else, with respect to the prospective purchase of the [3162] Winckler-Smith Citrus Products Company, or the stock of that company? A. I do not.

* * *

Q. (By Mr. Strachan): Have you investigated within your organization to find out whether or not any other person in that organization conducted such negotiations? A. I have investigated.

Q. What did your investigation disclose?

A. I can find no evidence of any such negotiations.

Mr. Strachan: That is all. [3163]

Cross-Examination

By Mr. Dixon:

Q. Mr. Covington, you were with this firm, of course, back in 1951 and 1952? A. Yes, I was.

Q. Do you recall whether you had any telephone conversations with anyone at Winckler-Smith or the trustee during those years concerning the sale of the plant? A. Not that I recall.

Q. Mightn't you have had them? You have a lot of telephone conversations, I presume, with a lot of people concerning properties and investments, do you? A. Sure, we do.

Q. You might have had some over the phone dur-

(Testimony of Paul A. Covington.)

ing that year concerning this matter that you don't now recall, isn't that so? A. It is possible.

Mr. Dixon: That's all.

The Court: I notice the questions asked and your answers concerned negotiations. Does the record show that Winckler-Smith said he entered into negotiations?

Mr. Strachan: Well, discussions, I think.

The Court: Do you know whether you had any inquiries, or did you inquire from the firm whether you had any inquiries? [3164]

The Witness: I did inquire from everyone in the firm who would normally conduct that.

The Court: As to inquiries?

The Witness: As to inquiries.

The Court: As well as the question of negotiations?

The Witness: Yes, I did. [3165]

* * *

January 26, 1956—2:00 P.M.

* * *

PAUL A. COVINGTON

the witness on the stand at the time of recess, having been heretofore duly sworn, was examined and testified further as follows:

Cross-Examination

By Mr. Dixon:

Q. Mr. Covington, did you have a Sherwood Field as manager of the Buying Department of your firm in 1952? A. Yes.

(Testimony of Paul A. Covington.)

Q. Is he still with your firm? A. Yes.

Q. Did you contact him among other members of your staff to inquire as to whether he had ever had any conversation with Mr. Winckler about Winckler & Smith?

A. Mr. Field has been out of town. I believe he is due back today or tomorrow. He was not in the office today. [3166]

Q. Would you recognize his signature?

A. I think I would.

The Court: Has this been shown to counsel?

Mr. Dixon: I will show it to him, your Honor.

The Court: Mark it for identification plaintiff's next in order.

The Clerk: Plaintiff's Exhibit 81 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 81 and received in evidence.)

Mr. Strachan: May I see it?

(Mr. Dixon handing document to Mr. Strachan.)

Q. (By Mr. Dixon): I will hand you Plaintiff's Exhibit 81 and ask you if you recognize Mr. Sherwood Field's signature thereon.

A. That is correct.

Q. That is his signature?

A. It is on our letterhead.

The Court: Speak up.

The Witness: That is correct, and it is on our letterhead.

(Testimony of Paul A. Covington.)

Q. (By Mr. Dixon): Did you have an opportunity to contact Mr. Field with reference to the inquiry that you made of other members of the staff?

A. No, I have not.

Mr. Dixon: Plaintiff's Exhibit 81 offered in evidence, [3167] your Honor.

The Court: Let me see it.

(Mr. Dixon handing document to the court.)

The Court: Exhibit 81 received in [3168] evidence.

* * *

O. E. HANSON

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: O. E. Hanson. [3169]

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr Hanson?

A. Anaheim, California.

Q. You are now in retirement, I understand?

A. That's right.

Q. Prior to your retirement by whom were you employed? A. Bank of America.

Q. How long were you employed by the Bank of America? A. 35 years.

Q. You were the branch manager of the Anaheim Branch, is that correct, at some time?

(Testimony of O. E. Hanson.)

A. Yes, sir.

Q. For how long were you manager of that branch?

A. From 1937 until October 31st last year. About 17 years.

Q. During that time did you have any occasion to consider the credit sought from time to time by the Winckler & Smith Citrus Products Company?

A. I did.

Q. Prior to the Chapter XI reorganization did the Bank of America extend any credit to the Winckler-Smith company?

A. Will you state that again, please?

Q. Before the Chapter XI bankruptcy in 1948 and '49——

Mr. Dixon: If the court please, I think the jury ought [3170] to be instructed, or counsel should refrain from using the word "bankruptcy" in his questions. It was not a bankruptcy of this corporation.

The Court: We have been over this before. Reframe your question, Mr. Strachan.

Q. (By Mr. Strachan): Did the Bank of America or the Bank of America branch of which you were manager extend credit to the Winckler-Smith Citrus Products Company before the organization proceedings in 1948, '49? A. No.

Q. After those reorganization proceedings were completed did Mr. Winckler call on you with a view to securing credit accommodations for the company?

A. He did.

(Testimony of O. E. Hanson.)

Q. What discussion did you have with him at that time?

The Court: I am going to inquire of counsel the purpose of this line of proof. Approach the bench.

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: This is rebuttal of Mr. Winckler's testimony——

The Court: Rebutting what?

Mr. Strachan: He testified that he approached the Bank of America for credit, and that they had a million dollar line of credit at the Bank of America.

Mr. Dixon: No. [3171]

The Court: Can you show me the transcript?

Mr. Strachan: Yes. (Exhibiting volume to the court.)

I have just referred to record page 1017, beginning at line 8.

He also testified that he went to the Bank of America to refinance the RFC loan. He testified to conversation with Mr. Hanson.

The Court: What happened with your first witness illustrates the problem you have got.

The impeachment of efforts to refinance the RFC loan, I think that is definitely impeachment of immaterial matters.

You have already called one witness, which I suppose hasn't done you any good on that problem.

Mr. Strachan: His testimony is that they all

(Testimony of O. E. Hanson.)

gave him one answer, that because of the inability to get fruit, and for that reason only, they couldn't refinance.

That is how he has tried to tie this thing in to the fruit supply problem.

The Court: This other witness, the way it turned out he knew nothing about it, and then at the end of it it turned out there had been some kind of a letter written.

All right. [3172]

(The following proceedings were had in the hearing and presence of the jury:)

Q. (By Mr. Strachan): Will you tell us what discussion you had with Mr. Winckler when he called on you following the return of the plant to Winckler & Smith operations after the first reorganization proceedings?

A. He approached us for a certain amount of credit to finance shipments of single-strength orange juice, I remember.

Q. A little louder, please. We can't quite hear you.

A. To finance shipments of single-strength orange juice on the basis of documentary drafts with bills of lading attached.

Q. That is, as shipments were made and the shipping documents were received, then you would advance money against the shipments, is that correct?

A. That's right.

(Testimony of O. E. Hanson.)

Q. And you held the billing for those shipments as security for the bank?

A. Yes, sir. We had title to the commodity.

Q. Did Mr. Winckler try to secure from you any further line of credit; if so, what did you tell him?

A. I have no such recollection, sir.

Q. Do you recall whether the bank extended some credit to the corporation on guarantee by Mr. Rubin? A. Yes, we did. [3173]

Q. Will you tell us what that transaction was?

A. Well, it was quite a while ago, and if my memory serves me right, we agreed to loan or extend credit on these documentary drafts to the extent of Mr. Rubin's guarantee.

Q. So that the credit you extended was secured by the shipping documents and the invoices, and also by the guarantee? A. Yes, sir.

Q. Can you recall what was the maximum amount of credit extended on that secured basis?

A. Less than $50,000.

Q. That was the maximum loan at any one time?

A. Well, the guarantee was $50,000 and we never exceeded that.

Q. Did you at any time extend or the bank extend to Winckler & Smith Company any credit on other than a secured basis?

A. I think at one time we extended him a certain amount on Mr. Rubin's guarantee.

Q. But never on the individual credit of the corporation, is that correct? A. That's right, sir.

Q. Do you recall that at one time Mr. Winckler

(Testimony of O. E. Hanson.)

called on you when the RFC mortgage was in default with a view of attempting to refinance it?

A. I have a faint recollection.

Q. Will you tell us as best you can remember it what [3174] occurred at the time he sought to have the Reconstruction Finance loan refinanced by the Bank of America?

A. Well, we had a verbal application, let us say, at which time he approached us for a real estate loan to make up the RFC loan.

Q. Do you recall whether the loan was in default at that time?

A. It was my understanding it was in default, yes, sir.

Q. And can you tell us what disposition you made of that verbal application?

A. Well, it was rejected, probably for two reasons: One, that it was a one purpose building and, secondly, that it was already in default.

Q. Do you remember what if any showing was made in support of the verbal application for that refinancing?

A. Well, I have a recollection that Mr. Winckler brought in an appraisal from some independent appraising company which showed the value of the property.

Q. Do you recall what the value as shown by that appraisal was?

A. No, sir, but it was several hundred thousand dollars.

Q. After that appraisal was shown to you, did

(Testimony of O. E. Hanson.)

you decline to loan the $50,000 for refinancing the RFC loan?

A. Yes, sir. No formal application was [3175] filed.

Q. At any time during your business relations with Mr. Winckler, did you ever tell him that the reason that you were not extending credit or would not refinance the mortgage loan was because he was unable to get citrus fruit for processing?

A. No, sir.

Mr. Strachan: That's all.

The Court: This has been offered for impeachment purposes?

Mr. Strachan: Yes, sir.

The Court: All right.

Cross-Examination

By Mr. Dixon:

Q. Mr. Hanson, the Bank of America, that is the Anaheim branch, did the financing of the Winckler & Smith Company to the extent that it did any, is that so? A. Would you repeat that, sir?

Q. Perhaps my question isn't very well worded, Mr. Hanson. It is a fact, is it not, that during the years 1949 and 1950, the Winckler & Smith Company was loaned substantial amounts of money by the Bank of America at Anaheim?

A. Yes, sir.

Q. Do you recall approximately how much the total amount was during those two years?

A. You mean the aggregate? [3176]

(Testimony of O. E. Hanson.)

Q. Yes, in the aggregate.

A. I couldn't answer that, sir.

Q. Was it in excess of a half million dollars?

A. I wouldn't care to answer it, because it would be merely a guess.

Q. Will you tell the jury what that was? As I understand your answer to counsel's question, the money that was loaned to Winckler & Smith during 1949 and 1950, was loaned on inventories or bills of lading representing sales of inventory and stock, is that correct? A. That's right.

Q. Is that an unusual type of loan for a bank to make? A. No, sir.

Q. It is customary, I take it?

A. That's right.

Q. Is that what is called sometimes the factoring of accounts? Is that a fair description, or is that different?

A. It is not exactly the same, I don't believe, in banking terms. But we held the commodity. We had title to the commodity and it was ours until the drafts were paid.

The Court: That is because when goods are shipped on a bill of lading, the holder of the bill of lading controls the delivery with the title of the goods?

The Witness: That's right.

The Court: Will you tell the jury that? They may not be [3177] familiar with a bill of lading.

The Witness: In other words, when a bill of lading with a draft attached is brought to the bank, the

(Testimony of O. E. Hanson.)

bank then gets title to the commodity, and, of course, when the bill of lading is paid off, why, the money comes back to the bank. That is how the bank gets their money back, gets their loan paid off. [3178]

Q. When you made these loans, Mr. Hanson, did you have any idea or did you make any inquiry as to the volume of business that was done by Winckler & Smith, and concerning which business you were being secured for any moneys that you loaned to Winckler & Smith in the years 1949 and '50?

A. The volume?

Q. Yes.

A. We had no way of knowing what the volume would be, but at no time would the outstanding indebtedness be greater than the guarantee which we held.

Q. I am talking now about the financing charges or the financing of loans by securities securing the loan on the inventory or products sold by the company.

I find it rather awkward to describe it, but you know the type of loan that I am referring to?

A. Yes, I understand that part of it, but I am not quite clear about some of the rest of your question.

Q. In other words, before you would make a loan, say, a line of credit up to a certain amount, you would have to have security for the loan by way of the inventory of the company; is that the way it is worked out in layman's language?

A. Yes, that is correct.

(Testimony of O. E. Hanson.)

Let me explain. These bills of lading are brought in to the bank, and possibly one or two or three every day, [3179] and then the money starts coming back, so you have a revolving sort of a thing, see?

Q. And as the bills of lading come in and are applied on the loan, then the loan goes on as long as the security or the inventory is adequate in the judgment of the bank, is that correct?

A. As long as we had satisfactory experience.

Q. And has the Bank of America had loans of that character and made them with Winckler & Smith during the years '49 and '50?

A. Yes, sir.

Q. It is a fact, is it not, that during the year '49, for example, the business of the company was in excess of one million dollars?

A. I couldn't answer that, sir.

Q. Do you recall writing to Mr. McFarland in Kansas City, in 1950, who had addressed an inquiry to you and the bank concerning Winckler & Smith?

A. I have no recollection.

The Court: Mark it for identification and show it to counsel. Exhibit 82.

The Clerk: Exhibit 82 for identification.

(The exhibit referred to was marked Plaintiffs' Exhibit 82 for identification.)

Q. (By Mr. Dixon): Mr. Hanson, I will hand you what has [3180] been marked Plaintiffs' Exhibit 82 and ask you if that is your signature at the bottom of the letter? A. It is, sir.

Q. Did you write that letter to Mr. McFarland?

(Testimony of O. E. Hanson.)

A. I did.

Q. And was a copy sent to Winckler & Smith, if you know?

A. I don't know whether a copy was sent to Winckler & Smith. I doubt that, because it is of a confidential nature.

Q. The facts stated therein are true, are they, or were at the time you stated them?

A. They were to my best knowledge.

Mr. Dixon: Plaintiffs' Exhibit 82 offered in evidence.

The Court: Let me see it.

Mr. Strachan: I don't think it has any relevancy or materiality.

The Court: Let me see it.

(Document handed to the court.)

The Court: It is another one of these things that would be admissible for a limited purpose only.

Mr. Dixon: That is all we are offering it for, your Honor.

The Court: Objection overruled. Received in evidence, but it is not to be received as any evidence of the facts contained therein, but only to be used in connection with [3181] the testimony of this witness. It is to be used by the jury in judging the testimony of this witness.

(The exhibit referred to, marked Plaintiffs' Exhibit 82, was received in evidence.)

Q. (By Mr. Dixon): Mr. Hanson, do you know

(Testimony of O. E. Hanson.)

time when the conversation took place?

what the volume of sales was of Winckler & Smith in 1951 when they inquired of the bank concerning a loan that counsel has asked you about; do you recall? A. '51?

Q. Yes.

The Court: Referring to the testimony about the application on the RFC loan.

The Witness: No, I do not know, sir. I can't remember.

Q. (By Mr. Dixon): During that year the bank did loan some money to Winckler & Smith under this security arrangement that you mentioned, is that correct? A. I think we did, sir.

Q. Is it the customary practice of the bank when it is making a loan to a closed corporation of a substantial amount, to require the signature of the officers, or the principal stockholders, of that corporation on the note?

Mr. Strachan: Your Honor, I don't think it is properly called a closed corporation. The evidence shows they were trying to sell and did sell some stock to the public.

Mr. Dixon: The evidence shows the stock sale was withdrawn, [3182] counsel, as you know, in the early part of June of 19——

The Court: Reframe your question and leave out "closed corporation."

Q. (By Mr. Dixon): What is the policy of the bank, or what was it, Mr. Hanson, in 1951, with reference to requesting or requiring the signatures

of officers, directors, or stockholders on loans as additional security?

A. Well, that is the understanding that I had with Mr. Winckler at the time we agreed to loan him money; that we would have this personal guarantee, otherwise we would not be interested.

Q. And Mr. Winckler signed the note, as well as the others, did he not?

A. I think he signed a continuing guarantee, which is equivalent of guaranteeing the note, along with Mr. Rubin.

Q. I think you said one of the reasons you turned down the loan was because this was a one-purpose plant in the sense that it was usable for just the processing of citrus juices, in other words, the type of plant or security that was involved in any such loan was one which would have a restricted market value in the event of sale; is that one of the reasons?

A. I think we are talking about two different things. I am talking about the operating line of credit, and I think you are talking about the application for real estate loan. [3183]

Q. Yes. I am sorry I hadn't indicated or made it clear to you that I was talking about the application that counsel inquired of you concerning the loan or a loan in 1951 to refinance the RFC loan. That is the one that I am talking about. Was that one of the reasons that you mentioned?

A. Well, there were two reasons as I gave you. One was that it was a one-purpose building, which banks generally are not very much interested in

(Testimony of O. E. Hanson.)

making loans on. And the other was that the loan was already in default.

I think those were the two primary reasons.

Mr. Dixon: I think that is all. Thank you very much. [3184]

Redirect Examination

By Mr. Strachan:

Q. Mr. Hanson, whether or not the bank would extend credit to the corporation without security or without a guarantee by some other person would depend upon the financial standing of the borrower, would it not? A. Yes, sir.

Q. And if the borrower had sufficient assets in comparison to his liabilities, the bank would extend credit to such a borrower for a proper purpose without any security or without the guarantee of any third person, would it not?

A. Yes, sir. It is quite a common practice to do so.

Q. That is the ordinary practice, is it not?

A. Yes, sir.

Q. From your examination of the financial condition of Winckler-Smith Company, did you conclude that the bank could not providently loan money to Winckler-Smith Corporation except on a secured guaranteed figure?

A. That was our opinion, sir. [3185]

* * *

NED LEWIS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

* * *

Q. What is your business?

A. I am the manager of a local import and export business by the name of Wilbur Ellis Company.

Q. In what business is Wilbur Ellis Company engaged?

A. They are engaged in many types of business. We handle animal feeds, we handle plant foods, and we handle frozen sea foods.

Q. Do you know Mr. Nicholas Winckler?

A. Yes, sir.

Q. Mr. Winckler testifying in this case said that among other persons that he contacted in efforts to refinance a loan on his plant or in an effort to sell the plant, he contacted various persons, including Wilbur Ellis Company. [3187]

Do you recall whether Mr. Winckler contacted you in that connection? A. He did.

Q. Will you tell us what was said by him and—was it you he contacted? A. Yes.

Q. Did you discuss the matter with him?

A. Yes.

Q. About when and where was the conversation?

(Testimony of Ned Lewis.)

A. To the best of my recollection, it was some time in 1951. Our company had been purchasing one of the by-products from his plant and in the various courses of business that we had with him he suggested that he come in and talk to me about a refinancing, or whether we might be interested in some type of business relations with him further than the purchase of by-product citrus peel.

Q. About what time in 1951 was that, if you can recall?

A. My memory is hazy on that. I am not sure just when it was. About four or five years ago.

He came into my office one day and we went over the situation quite thoroughly, and I told him at that time, I believe, that it was rather an interesting set-up, that it was the type of business with which I was not familiar and I would be very pleased to take it up with my associates and let him know whether there was any community of interest. [3188]

I did so, and it was the conclusion of our group that it was the type of business about which we knew little and foreign to what we generally did, and largely because of that and largely because we had plenty of interests in our business, anyway, that we would advise Mr. Winckler we were not interested in going further with the matter.

Q. And did you so advise him? A. I did.

Q. And did you advise him of the reasons for your decision?

A. To the best of my knowledge, I did. I believe I wrote him a note in the matter.

(Testimony of Ned Lewis.)

Q. Was the reason you decided against investing in the business or refinancing the business the fact that, if it were a fact, Mr. Winckler, had no source of raw fruit supply?

A. I don't remember that that had anything to do with it. I don't think I knew enough about it to go into that.

Mr. Strachan: That's all.

Mr. Dixon: May I have this marked for identification next in order?

The Court: Plaintiff's Exhibit 83.

(The exhibit referred to was marked Plaintiff's Exhibit No. 83 for identification.) [3189]

Cross-Examination

By Mr. Dixon:

Q. Mr. Lewis, do you recall when it was that you had this conversation with Mr. Winckler that you have mentioned concerning acquiring an interest in Winckler & Smith?

A. No, I do not remember the dates.

Q. Were you at that time handling any products for Sunkist? A. No.

Q. I will hand you what has been marked for identification as Plaintiff's Exhibit 83 and ask you if that is your signature. A. It is.

Q. And the date of the letter is November 6, 1951, addressed to Winckler & Smith Company of Anaheim, California, is that correct?

A. That is correct.

Q. Does that refresh your recollection as to the

(Testimony of Ned Lewis.)

A. It does. I would say it was shortly before November 6th.

Q. Was the substance of your conversation with him at that time concerning the matter substantially as set forth in your letter of November 6, Plaintiff's Exhibit 83?

A. I believe that I told him that I would take it under [3190] advisement with my associates, and I don't think I gave him any answer at the time, and I believe the letter is the answer to his suggestion that we go in with him.

Q. Did you tell him at that time that after your discussion of the matter you were very much impressed with his grasp of the business?

A. I think so. He made a very good impression on me as far as knowing his business was concerned.

Mr. Dixon: That's all. Plaintiff's Exhibit 83 offered in evidence.

Mr. Strachan: It is not material. It is not in any way inconsistent with what the witness has testified. [3191]

The Court: Objection overruled.

I don't think it is much more pertinent than the witness' testimony on direct, but I will receive it in evidence.

Mr. Dixon: I don't care to read it to the jury.

The Clerk: Plaintiffs' Exhibit 83 received in evidence.

* * *

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: I want to say, your Honor, that I feel it may well have a prejudicial effect on the jury to have your Honor comment on the pertinency or lack of pertinency.

The Court: Did you lay any foundation when you were examining Winckler, other than your general questioning that in this particular case this man had told him that that was the reason he wouldn't——

Mr. Strachan: He said everybody they contacted gave him one reason, and only one reason, for not refinancing the business, and that was lack of [3192] fruit.

I just wanted to record here my objection.

The Court: I will tell the jury to disregard what I said.

Mr. Dixon: Your Honor, this testimony that counsel is directing these witnesses to apparently relates back to the inquiry that he made as to what efforts Winckler had made to sell the business and refinance it, and the record will show that Mr. Winckler testified that he made at least 100 contacts. Now, the defendant brings in before the court, so far, three of those contacts for the purpose, presumably, of impeaching Winckler's testimony, that he never contacted them.

That is my understanding of what he is trying to do with the witnesses.

The Court: One witness, yes; but these other witnesses Mr. Strachan contends are impeachment of Winckler's statement that everybody had declined to refinance because Winckler had no source of supply.

Mr. Dixon: That was a general statement. I agree it is not applicable to all witnesses.

The Court: My point is that it was a general statement, and I think if you wanted to impeach, if you want to be technical, you would have to pin it down to each one, rather than impeach as you are doing.

That is the reason for my remark. I personally think it is very questionable whether it is impeachment, but I will [3193] tell the jury to disregard what I said.

* * *

(Whereupon, the proceedings were resumed in open court within the hearing of the jury as follows:)

The Court: Ladies and gentlemen of the jury, as I have told you time and time again, you are the sole judges of the facts in this case, and discussions between the judge and counsel are not evidence and have no bearing upon your view of the facts. Specifically, in this instance I direct you to disregard what I said about the letter.

They are in the record and you may consider them. They are offered for impeachment purposes, and you may consider them for that purpose in the [3194] case.

NELS WARNER

called as a witness by the defendants, being first sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

Q. Mr. Warner, where do you live?

A. 824 North Helena, Anaheim.

Q. What is your business?

A. Citrus. Citrus processor.

Q. By whom are you employed?

A. By Golden Citrus Juices in Fullerton.

Q. Raise your voice a little. This is a rather large room with a high ceiling, and you will have to speak a little louder.

Where is that plant located?

A. 130 West Santa Fe, Fullerton.

Q. How long have you been employed by Golden Citrus in that plant? A. Since March, 1950.

Q. That was the time the plant first opened?

A. That's right.

Q. And you have held your present position with the company in that plant ever since you took the job, is that [3195] correct? A. Yes.

Q. Will you tell us the nature of the processing operations that are conducted at that plant?

Mr. Dixon: If the court please, I object. I don't see how it can be possibly relevant to any of the issues in this case, as to what went on in the plant of the Golden Citrus Company in Fullerton.

The Court: Objection sustained.

(Testimony of Nels Warner.)

Do you want to approach the bench?

Mr. Strachan: I don't think so.

The Court: All right.

Q. (By Mr. Strachan): Prior to your employment by Golden Citrus, where were you employed?

A. Winckler & Smith, in Anaheim.

Q. How long were you employed in that plant?

A. From 1946 through '50, March.

Q. During the time that the business was closed down, while it was in Chapter XI reorganization, by whom were you employed?

A. Well, I was employed by Silzle Corporation.

Q. And that plant is where?

A. That is in Anaheim. I believe it is 206 or 208 South Atchison Street.

Q. During the year 1951 did Golden Citrus process any [3196] single-strength juice?

Mr. Dixon: Again, your Honor, I must object.

Mr. Strachan: I will connect this up, your Honor.

The Court: I want you to approach the bench. This time I direct you to. Previously I invited you.

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Strachan: On this subject the witness will testify that their sources of fruit are the Independent Growers. That they had a surplus of fruit.

The Court: Who did?

Mr. Strachan: Golden Citrus. They were able to

(Testimony of Nels Warner.)

buy fruit, and they had a surplus of fruit that they actually were selling or offering for sale.

The Court: What is this Golden—a cannery?

Mr. Strachan: A cannery.

What I wanted to prove by that first question, which I think I should be permitted to prove, is that they are equipped and went into business to process frozen concentrate. That is primarily their business.

The Court: They process frozen concentrate?

Mr. Strachan: Yes.

The Court: Not single-strength?

Mr. Strachan: Single-strength only as a by-product when their concentrate equipment is in full use. [3197]

Mr. Dixon: What is this man in Golden Citrus?

Mr. Strachan: Superintendent of the plant.

Mr. Dixon: He doesn't run the plant, buy the fruit, and all that?

Mr. Strachan: He runs the plant.

The Court: And Golden bought fruit from who?

Mr. Strachan: From the Independent Fruit Growers, the same source that Winckler had. And they processed single-strength juice in that year.

Mr. Dixon: 1950?

Mr. Strachan: 1951.

Mr. Dixon: From fruit they bought?

Mr. Strachan: Yes.

Mr. Dixon: How does he know? I want the records, counsel. I am not going to be satisfied with that.

Mr. Strachan: I think he knows where they got

(Testimony of Nels Warner.)

the fruit, and I think he knows what products they made.

The Court: What were they paying for fruit, do you propose to show that?

Mr. Strachan: I don't know.

The Court: Do you propose to show how much single strength they made?

You said it was only made as a by-product.

Mr. Strachan: It was only made when their concentrating equipment was overloaded, that's [3198] right.

Mr. Dixon: I would like to know how much they have made.

Mr. Strachan: We can ask him. He probably can tell you.

Mr. Dixon: I don't see any relevancy to this thing, unless the testimony that he expects to offer is that this company, Golden Citrus, actually bought fruit at, say, $40 for 120 pounds solids, and processed it into single-strength juice and sold it at a profit during that year.

That is the question. Nothing else.

Otherwise we have to go into the question whether there was a loss or profit.

The Court: Do you propose to show that?

Mr. Strachan: Show what?

The Court: That they bought $40 fruit?

Mr. Strachan: They bought from the Independents at prices that were usually parallel to and the same as Sunkist.

(Testimony of Nels Warner.)

The Court: And processed into single-strength orange juice at a profit?

Mr. Strachan: I don't know whether they made a profit. But they did it.

Mr. Dixon: It wouldn't be relevant at all in this case.

The Court: If you show that they processed single-strength juice and lost, you are offering evidence on the plaintiff's side of the case. If they did it at a profit, it might have some materiality. [3199]

Mr. Strachan: I don't think you can say, when you have a large plant producing many products, whether product A makes a profit and product B doesn't.

I take it that these people are in business for a profit, and if they make single-strength juice it is because they don't have as great losses as they otherwise would have, and prudent businessmen were able to buy fruit and process it into single-strength that year.

The Court: If they were essentially making frozen concentrate, they might well make a little single-strength juice at a loss in order to keep the plant running. What would that tend to prove?

Mr. Strachan: It tends to prove that one of Winckler's competitors was buying fruit and making single-strength juice, when he was not.

I say it gives rise to a strong inference that there was some reason, other than his claim that he couldn't obtain fruit at the right price.

Mr. Dixon: If this witness can testify of his

(Testimony of Nels Warner.)

own knowledge that this company bought fruit, 120 pound solids, at $40 a ton, plus delivery charges, and processed that particular fruit into single-strength juice, and sold it at a profit, I will agree that his testimony would be competent.

Mr. Strachan: I don't know whether he can testify as to the profit, or not. But at least it shows a competitor [3200] was buying fruit at those prices and was processing it during that season.

Presumably they were doing it for business reasons.

The Court: Where would that leave us?

Then we would be up in the air. If the witness only went so far as to say it was bought and was processed into juice, then we are up in the air on another issue—was there a profit or loss?

Then we again proceed with another issue that has to be run down.

Unless——

Mr. Strachan: I don't raise the issue of profit or loss. I just say there is evidentiary significance to the fact that a competitor in this field was buying fruit and making single-strength juice.

The Court: You don't specify how much juice.

Mr. Strachan: I will find out. I didn't ask him.

Mr. Dixon: Didn't you talk with this witness before you put him on the stand? Don't you know what he is going to testify to, counsel?

Mr. Strachan: Do you want to have me sworn?

Mr. Dixon: No.

(Testimony of Nels Warner.)

Mr. Strachan: This is a very vigorous cross-examination, Mr. Dixon.

Mr. Dixon: I contend if all you expect to get out of [3201] this witness is what you have indicated, that it is an utter waste of time of this court, and the whole examination would be fruitless. And if you don't know now, I think this is kind of late to start discovery proceedings, in the courtroom, from this witness.

Mr. Strachan: Thank you for the lesson in practice and procedure, Mr. Dixon.

Mr. Dixon: Just a passing comment.

The Court: Well, both of you cool off.

If you haven't talked to him, you should have an opportunity to for the purpose of making your offer of proof so I can rule on this matter.

Personally I don't think it is material to the issues.

If you want to talk to him further, I will take a recess and let you do it, or I will let you make your offer of proof now, or I will consider this as your offer of proof.

Mr. Strachan: I think you can consider this as my offer of proof on this line of examination.

The Court: So I understand your offer, you don't know how much tonnage of oranges were bought or how much single-strength juice was made, or whether the single-strength juice was made at a profit or loss, or at what price the product oranges were purchased?

Mr. Strachan: He testified that they were pur-

(Testimony of Nels Warner.)

chased at the Independents' price, which was substantially the same as [3202] the Sunkist posted price, and that it was purchased on a basis that was adjusted according to solid content.

Mr. Dixon: I would like to have that testimony from this witness.

Can you represent this witness will testify to that?

Mr. Strachan: Yes, Dr. Dixon, I can. And I will tell you that under oath, if you want me to.

Mr. Dixon: Then I have no further objection. Proceed if you can do that.

Mr. Strachan: That is what he has told me.

The Court: Are you prepared to show the amount of tonnage and the amount of juice produced?

Mr. Strachan: I will ask him.

The Court: You don't know?

Mr. Strachan: I don't know what his answer is going to be. He told me that it was produced.

Mr. Dixon: Then how can he make an offer of proof, your Honor, of the kind that he has presented to this court?

Mr. Strachan: If it is a question of quantity, I can ask him and tell you what the quantities will be: but I know he will testify that he bought the fruit and he made the juice.

The Court: On your present offer, the objection is sustained. If you want a recess for the purpose of talking to the witness, I will hear [3203] you.

* * *

(Testimony of Nels Warner.)

(The following proceedings were had outside the hearing and presence of the jury:)

The Court: Let the record show the jury absent.

Mr. Strachan: Your Honor, during the short recess I talked to the witness. The testimony would be that——

The Court: This is supplementing your offer of proof?

Mr. Strachan: There was some question raised as to what the amounts would be and I can supplement the offer. His testimony would be that during the canning season of 1951, due to the fact that they had oranges in excess of capacity of their frozen concentrating facilities, they packed between 80 and 100 thousand cases of single-strength orange juice, and that they still had surplus oranges; and they sold those oranges, about 1,000 tons, at prices that ranged from $30 to $34 a ton.

I am told that the record shows that some of that tonnage was bought by Winckler, 16 or 17 tons.

The Court: Then you don't propose to put any proof on as to whether they packed this orange juice single-strenth at a profit?

Mr. Strachan: No, I don't think that can be isolated and I don't think it is essential.

The Court: What is the position of the plaintiff?

Mr. Strachan: This I might add. This is information that was furnished to the plaintiff pursuant to a subpoena [3205] served on Golden Citrus.

(Testimony of Nels Warner.)

Mr. Dixon: Golden Citrus, counsel? Now, let's get this straight.

Mr. Strachan: That is my understanding.

Mr. Dixon: I think this is the one company I did not get the subpoena served on. There was no subpoena served on this company, so I don't have the facts of what they would have returned to a comparable subpoena, but——

The Court: Plaintiff's subpoena, or a defendants' subpoena?

Mr. Strachan: Plaintiff's subpoena duces tecum, and we have copies of what was returned to Mr. Dixon, or we were told that that was given to Mr. Dixon in response to the subpoena.

Mr. Dixon: I have Mutual Citrus Products.

The Court: Do you have a copy of that subpoena you are talking about?

Mr. Strachan: We have just sent for it.

Mr. Dixon: Just a moment, your Honor. I may be in error. Golden Citrus Juices. I will take it back. I did serve one on them.

The Court: All right. Is there any objection by the plaintiff to this offer of proof?

Mr. Dixon: Yes, because on information given to me by Mr. R. E. Freeland of Fullerton, who called me with reference to it, all of the products produced by this company since [3206] 1951 were frozen concentrate. There were 240,000 gallons in 1951 out of operations, since 1951, no single-strength juice. The source of their fruit was American

(Testimony of Nels Warner.)

Fruit Growers Association. This shows it sold them 988 tons in 1951. That is the information that was given to me by Mr. Freeland. There was no information that they processed any single-strength juice in 1951, according to the information that I have here in my notes.

Mr. Strachan: What I am offering in opposition to what Mr. Dixon has stated is sworn testimony.

The Court: Well, what is the plaintiff's objection to the offer of proof?

Mr. Dixon: Plaintiff's objection, your Honor, to the offer of proof is that the offer does not contain information or facts which would make it relevant to the issues or any of the issues of this lawsuit or which would tend to prove or disprove any such issues.

If I understand the purpose of this offer, counsel is putting this witness before the court for the purpose of showing that Golden Citrus Juices, Inc., purchased some fruit, that is, some Valencia oranges, from Ward in 1951. That is not in dispute, because I am informed by the company that they sold 988 tons to—bought 988 tons from Ward in 1951. However, they could not give me at my request the prices paid or the soluble content of the oranges any more [3207] than one of the other witnesses that testified here could, so that there was no basis for any comparison, the testimony being that the oranges were bought on a tonnage basis wholly without any reference to the soluble content

(Testimony of Nels Warner.)

of the oranges and, therefore, the prices paid would not be comparative.

Further, that the offer does not show that whatever was purchased—I mean, first, that the offer does not show the purchase price on a comparative basis to the evidence before this court as to the prices at which oranges were made available for processing purposes by Sunkist, and also by the testimony of Morgan Ward when he sold them.

Second, that the offer of proof does not show or contain any statement that this witness would testify that any of the oranges so purchased at whatever price were processed into single-strength juice by this company.

The Court: Well, that is what he said.

Mr. Dixon: And sold at a profit.

The Court: The matter can be handled on cross. You can bring out the character of the business, and the witness either knows or does not know whether it was sold at a profit. Objection overruled. Let's make it short and get rid of this witness.

Mr. Strachan: I shall, and may I go back and take up——

The Court: Personally, you put on your case, but I think if the witness has to make those admissions on cross, you have [3208] really got nothing, but technically you may have some slight——

Mr. Strachan: One of the charges is there is a monopoly and use of monopoly power, and we are showing——

The Court: But your testimony is going to admit

(Testimony of Nels Warner.)

by its very terms that this was an unusual situation that developed where they had more oranges than they could use for concentrate, and in an emergency situation they first canned some juice and then offered to sell the fruit, so you have got at best an exceptional situation. I am going to permit it.

Bring the jury down.

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The record will show the jury present and in their proper places.

Come back, Mr. Warner.

Q. (By Mr. Strachan): Mr. Warner, for the processing of what citrus product is the plant primarily designed? I am talking about the Golden Citrus plant?

A. Well, it is frozen concentrate, lemons and oranges, mostly oranges.

Q. What is the source of the fruits that are processed by Golden Citrus?

A. Repeat that, please?

(Question read.) [3209]

Q. (By Mr. Strachan): With reference to the year 1951.

A. Well, single-strength juice.

Q. No, the sources of the raw fruit.

A. That comes through our own packing houses.

(Testimony of Nels Warner.)

American Fruit Growers, and which we buy from the independents.

The Court: Are you connected with American Fruit Growers?

The Witness: Yes, Golden Citrus is.

Q. (By Mr. Strachan): In the year 1951, did Golden Citrus pack any single-strength Valencia juice?

A. Yes. I believe between 60 and 80 thousand cases.

Q. In view of the fact that the plant was primarily designed to produce frozen concentrate, will you explain to the jury how it happened that you produced some 60 or 80 or a hundred thousand cases, whatever you said, of single-strength juice?

A. It is an overflow of fruit that we couldn't handle in the plant on the frozen.

Q. That is your concentrated freezing capacity?

A. That's right.

Q. Wouldn't absorb all the fruit you had available from your sources? A. That's right.

Q. In packing single-strength juice, what extractors do you use? [3210]

A. The Brown citrus extractors.

Q. Do you use any Citromats at all in that plant? A. No.

Q. Now, in addition to having processed single-strength juice, did you still have some surplus oranges available? A. Yes, we did have.

Q. In 1951?

(Testimony of Nels Warner.)

A. Yes. I believe we sold about 1,000 [3211] tons.

Q. Do you know approximately the prices at which those surplus oranges were sold?

A. Not right offhand, but probably between thirty and thirty-five dollars a ton. It varies in price. Sometimes it is 30, other times it would be as high as 35. But it would average I believe around 33, $34 a ton.

Q. In the ordinary course of business and in normal years, is the fruit that is available to you, through your usual sources, in excess of the capacity of the plant to process it into frozen concentrate?

A. Do you mean——

Q. Do you ordinarily have fruit to sell?

A. Definitely, every year.

Mr. Dixon: Counsel, just a moment.

Are you the employee or the officer of this company that is in charge of the selling of the fruit?

The Witness: No, I am not.

Mr. Dixon: Then I ask, counsel, that the one who is in charge be produced on that testimony.

Q. (By Mr. Strachan): Do you have personal knowledge of the fruit being sold from your plant that is surplus?

A. Definitely. I am the plant superintendent.

Q. Based upon your experience and familiarity with the processing in the industry, will you tell the jury how the productive capacity of Citromats compares with the productive [3212] capacity of

(Testimony of Nels Warner.)

Brown's citrus extractors, in the production of single-strength juice?

Mr. Dixon: I will object to the question, your Honor.

The Court: Sustained. There is no dispute on the question. We have had testimony on it, and it would be entirely cumulative.

The Witness: Well, the difference between a Brown——

The Court: Just a minute. I sustained the objection to it.

The Witness: Excuse me, sir.

Q. (By Mr. Strachan): In your experience in the industry, have you ever known of any plant, except the Winckler-Smith plant, that processed Valencia oranges for single-strength packing, through the use of Citromats? A. No.

Mr. Dixon: I object, your Honor. It is the same question.

The Court: Sustained. The answer may go out, and the jury is instructed to disregard it.

Q. (By Mr. Strachan): Are you able to tell this court and jury for what purposes, and what purposes only, Citromats are used in citrus processing plants, generally, except the plant of Winckler & Smith?

Mr. Dixon: Same objection, your Honor; and objection to any further line of questioning along this line.

The Court: Sustained. [3213]

Mr. Strachan: Before the witness steps down I

(Testimony of Nels Warner.)

would like to discuss the matter, but I will go on with another subject now.

Q. (By Mr. Strachan): Will you tell us what you observed about the mechanical condition of the Winckler-Smith plant during the time that you were employed there between 1946 and 1950?

Mr. Dixon: Objection, your Honor.

The Court: What is your objection? What ground?

Mr. Dixon: On the ground that it is wholly irrelevant and immaterial, and the question is entirely too general in its nature. We will be here indefinitely.

The Court: Sustained.

Limit your question to the year 1951.

Mr. Strachan: The witness wasn't employed there during 1951.

The Court: Then he won't be able to testify.

We are not going to try out the condition of the Winckler & Smith plant in '46, '47 and '50. That is not the problem.

If we did that we would again multiply the issues. You would put proof on, and then the plaintiff wants to come back and put contradictory proof on.

Mr. Strachan: I don't think the plaintiff wants to put contradictory proof on, because I don't think any is available, your Honor. [3214]

The Court: The jury will disregard the remarks of the court and counsel. It is not evidence in the case.

(Testimony of Nels Warner.)

You know what the issues are. Let's proceed.

Q. (By Mr. Strachan): At the time when you were employed at the Winckler-Smith plant, will you tell us what procedures were followed for grading and culling raw fruit as it was taken into the extracting machines?

Mr. Dixon: I object, your Honor.

The Court: Sustained.

The witness was there until March, 1950. We are concerned with matters in '51 in that respect.

Mr. Strachan: Except for making a statement out of the presence of the jury of the proof I would tender, that is all the examination I have of this witness.

The Court: Make it now. Come forward with the reporter.

Mr. Strachan: The other witness I have is on the same question, I thought we could finish up with this witness, and then go ahead with the other.

The Court: All right, we will do that.

Cross-examine, Mr. Dixon.

Cross-Examination

By Mr. Dixon:

Q. Mr. Warner, what is your position or was your position at Golden Citrus in 1950?

A. Still the plant superintendent. [3215]

Q. Will you speak up, please, so that I can hear you and the jury can hear you?

A. I said plant superintendent.

(Testimony of Nels Warner.)

Q. Were you in charge of the buying of the fruit processed in the plant? A. No.

Q. Who was?

A. We had one fruit buyer at that time, in fact, I think there was about two or three of them. Mr. Ace Clark. Mr. Phil Twambly, assistant manager.

Q. But you had nothing to do with the buying or the pricing of it, that is, the price at which it was purchased by Golden Citrus? A. No.

Q. Golden Citrus, since 1951, has been processing frozen concentrates, has it not?

A. Correct.

Q. Entirely?

A. Not entirely. In '51 we produced some single-strength juice.

Q. And that is the amount that you testified to as put in from the surplus that you had after running the frozen concentrate? A. Yes.

Q. Did you have anything to do with the selling of [3216] the fruit by Golden Citrus? A. No.

Q. What is Golden Citrus? Is it kind of a half co-op?

A. Golden Citrus Incorporated at that time was owned by the American Fruit Growers and Mr. Tom Eddington. He is an independent grower and a packer. Since 1953 Minute Maid Corporation has bought in with him, so they own 66 per cent now, Tom owns one-sixth, and the American Fruit Growers own one-sixth.

Q. Are you a stockholder in Golden Citrus?

A. No, I am not.

(Testimony of Nels Warner.)

Q. You had nothing to do with the selling, then, of any fruit that they might have had available for sale in 1951, did you? A. No, I didn't.

Q. You had nothing to do with the determination of the price at which it would be sold, did you?

A. No.

Q. Have you examined and know of your own knowledge what the records of the company were with reference to the selling price of any fruit?

A. I do keep close contact with them——

Q. Just answer my question, Mr. Warner, and we will get along fine.

Mr. Strachan: He is answering it. [3217]

The Court: Read the question.

(The question referred to was read by the reporter as follows: "Q. Have you examined and know of your own knowledge what the records of the company were with reference to the selling price of any fruit?")

The Witness: Yes.

Q. (By Mr. Dixon): In 1951? A. Yes.

Q. Who made those records available to you?

A. The office.

Q. When? A. Before I came up here.

Q. Who made them available to you, Mr. Warner? A. Mr. Ace Clark, assistant manager.

Q. Who is Mr. Freeland?

A. He is the office manager and comptroller.

Q. Is he the one in charge of the records?

(Testimony of Nels Warner.)

A. He is in charge of the records.

Q. Did you ask him for the records?

A. He was not there.

Q. What examination did you make of the selling records of oranges in 1951 by Golden Citrus?

A. We have a girl there that is assistant to Mr. Freeland on all fruits handled, and all I had to do was ask [3218] her.

Q. Do your selling price records show the soluble content of the fruit sold? A. No.

Q. They don't?

A. Not that I know of. Not to my knowledge.

Q. It just shows the selling price per ton?

A. Right.

Q. But it does not show the soluble content of the tonnage sold?

A. That I wouldn't know.

Q. At least the records that you examined didn't show that, did they? A. That's right.

Q. Did I understand you to say, Mr. Warner, that you just talked to some girl in the office about these records?

A. No; I talked to Mr. Ace Clark, the assistant manager, and he had the girl look them up.

Q. And she brought them out and presented them to you? A. Right.

Q. When was this done, yesterday or today?

A. Today.

Q. Can you tell some of the people at this time that bought oranges from Golden Citrus in 1951?

(Testimony of Nels Warner.)

A. I couldn't tell you. [3219]

Q. You couldn't tell us? A. No.

Q. So this tonnage that you testified was sold in 1951, this surplusage—it was a surplus, was it not?

A. Yes.

Q. Of about how many tons?

A. I would say in the neighborhood of a thousand tons.

Q. Don't you know? You examined the records.

A. Not exactly, no. I don't watch them that close.

Q. From the records that were made available to you, you didn't add them up or determine how many tons were sold? A. No.

Q. And you don't know to whom they were sold?

A. No.

Q. Or for what purposes they were sold?

A. Well, let's put it, no.

Q. I didn't get your answer.

A. No.

Q. You had nothing to do with the selling of the single-strength juice that you testified was processed out of the surplus fruit in 1951, did you?

A. No.

Q. You are not the selling officer or official of this company, or weren't in 1951?

A. No. [3220]

Q. And you had nothing to do with the selling price of it? A. No.

Q. And you do not know what the selling price of the juice was, do you?

(Testimony of Nels Warner.)

A. I know of the juice oranges, yes.

Q. I am talking about the single-strength Valencia juice that you testified was processed from the surplus fruit that you mentioned in 1951.

The Court: He is talking about the canned juice.

The Witness: The canned juice, no, I do not know.

Mr. Dixon: That is all.

Redirect Examination

By Mr. Strachan:

Q. You said you didn't know whether the surplus fruit that was sold at approximately $34 a ton was sold with reference to solids; is that correct?

A. That's right.

Q. In the production of single-strength juice, as contrasted with concentrates, the Brix content is not important, is that correct? A. Right.

Mr. Strachan: That is all.

Subject to the offer I will make out of the presence of the jury, I think that concludes it, your Honor.

The Court: You may step down. [3221]

Do you have another witness to call?

Mr. Strachan: I think we can handle the other witness and the offer of proof at the same time. The subject matters will be about the same.

* * *

The Court: The record will show the jury absent.

Mr. Strachan: Your Honor, the matters which I thought were within the purview of your indicating rulings which I could have offered evidence on by this witness are the following:

The Court: This is your offer of proof?

Mr. Strachan: This is an offer of proof, yes, sir.

To show that the Brown citrus extractor produces better quantities and better qualities of single-strength juice; that perhaps 15 or 20 per cent more is obtained through the use of those extractors than through Citromats.

That the quality of the juice produced by the Citromat is inferior in that the oil content is high and that [3222] it cannot be entirely corrected by de-oiling equipment such as Winckler-Smith used.

The Citromat is ordinarily used in the industry for grapefruit or for the production of bases and hot concentrates, and that the Winckler-Smith plant is the only one known to this witness to have used Citromats in an attempt to produce single-strength juice.

As to the Winckler-Smith operation, the witness would testify that the Citromats were overworked to the——

The Court: What year was this?

Mr. Strachan: This was down through 1950, I think it was. March of 1950.

For the period down through and including March, 1950, the Citromats were being overcrowded with the result that a poor product was obtained, product in which there was too much peel and oil.

We would show also throughout the entire period

of his employment down through March, 1950, the use of graders and cullers was inadequate, that there was never more than one grader on duty, and sometimes none at all.

That after complaints had been received over the quality of the product, the dirt and the spots in the product had been made the subject of complaint, a conference was held between various interested people, including Mr. Winckler and the witness, and the witness said that he thought that the [3223] difficulty was due to rotten fruit and culls going into the plant for processing, and recommended that additional graders be used because the one grader was not sufficient to handle all of the raw fruit that was going into the Citromats, and that his suggestion was not followed.

He would also testify that as a result of failure to eliminate the contaminated and rotting fruit from the processing, contamination of product resulted, causing high bacteria count and poor quality of juice.

The witness would also testify that the sanitation in the plant was bad, there was water around on the floors, the residues from peel and juice were not properly disposed of, with the result that flies caused further contamination.

He would also testify that the plant was not mechanically in good condition, that he was unable to put it in good condition and Mr. Winckler said they had no funds for that purpose.

I have, also, the witness Templeton under subpoena and present. He is now employed as produc-

tion foreman at Golden Citrus plant and has been since July of 1950.

That he was an employee in the Winckler-Smith plant from August, 1949, to July of 1950.

His testimony would be the same as and would largely corroborate the testimony of Warner.

This evidence, your Honor, would be offered for [3224] various purposes. One would be to show the fact that there was bad product and that the bad product might well have been, as we will argue was, the major cause of the lack of sales and the financial collapse.

In addition to that, the testimony concerning the lack of adequate grading and culling would be in direct rebuttal of Mr. Winckler's testimony on that subject.

The Court: Warner would be quite an expert if he could testify about bacteria count.

Mr. Strachan: I think he is.

The Court: And contamination.

Mr. Strachan: I think he knows his business.

The Court: What is the objection?

Mr. Dixon: The objection, your Honor, is on the grounds previously stated, and, furthermore, that if this evidence is competent and relevant to any issues in the case, we would be required to, naturally, rebut it by testimony showing that the inspections of the plants that are processing fruit by the State of California, and so forth, were made and this plant complied with all of those inspection requirements, and so forth.

The Court: In other words, it would inject——

Mr. Dixon: A wholly collateral issue.

The Court: ——issues into the case that are collateral and would take a long period to [3225] try.

Mr. Dixon: Yes, your Honor. That is the basis of the objection.

The Court: Objection sustained on the grounds stated by counsel and upon the record heretofore made in the absence of the jury on similar matters, and upon other grounds that would be valid to sustain an objection.

Mr. Strachan: Would this be a good time, your Honor, for me to state my offer with respect to the witness Higbee?

The Court: Yes, sir.

Mr. Strachan: I would like to get that out of the way.

Mr. Dixon: What witness is this, counsel?

The Court: An offer as to the witness Higbee.

Mr. Strachan: I have indicated to your Honor in chambers this morning I had present as a prospective witness Mr. Higbee and I would, except for your Honor's suggestion in chambers, have had him sworn. I understand that in lieu of this I can make this offer as if he were actually on the stand, had been sworn, and I would make this offer as to what I would prove by him to the same effect as if he had actually been produced, sworn, and were on the stand.

The Court: Right.

Mr. Strachan: Ralph H. Higbee would testify

in substance that he is the chief chemist of Exchange Orange Products Company.

That he is a graduate chemist. After [3226] graduating and taking his degree in chemistry, he became a food chemist in the employ of the Department of Agriculture, assigned to the matter of supervising the observance and enforcement of Pure Food and Drug regulations.

After leaving the federal employment about 1921, I believe it was, he became a chemist in the employ of Exchange Orange Products Company, and has remained in that employment ever since until he became chief chemist in about 1945, I believe it was.

Mr. Higbee would testify that as chief chemist he had occasion to analyze the hot concentrate which Winckler & Smith undertook to manufacture for Exchange Orange Products in the year 1947; that a large part of the product was found to be defective in various respects; parts of it were inadequately pasteurized and were in an unsterile condition, and some of the product was so unsterile that the decomposition progressed to the point where it had to be destroyed.

Other of the product contained dirt and other foreign matter which rendered it unfit for consumption or use.

He would testify that the hot concentrate produced by Winckler & Smith for Exchange Orange Products was not a satisfactory product.

In addition, he would testify that he as a professional chemist could examine the acidity and Brix ratio [3227] of extracted juice and the acidity

and Brix ratio of products derived from that juice, raw juice, and by analysis and computation could determine to what extent the juice had been adulterated through the use of water, sugar, or citric acid, and could compute the extent of such adulterations.

He would testify that a rule of thumb for calculating the amount of dilution is to take the starting acidity, per cent of acidity, divide that by the final per cent of acidity, and multiply that by 100, and subtract 3 from that product, to determine the per cent of dilution.

As an example, the starting acidity of 1.50, divided by a final acidity of 100, times 100, minus 3, would give a result of 147, which result would indicate that the dilution consisted of adding 47 gallons of water to 100 gallons of original juice, or a 47 per cent addition.

He would further testify that this sheaf, which I will now ask to have marked as a defendants' exhibit for identification——

The Court: The next number, Mr. Clerk?

The Clerk: Defendants' Exhibit CM.

Mr. Dixon: Have you a copy for us, counsel?

Mr. Strachan: I will have to get it for you.

The Court: Get it later. This will be marked CM for identification. [3228]

(The exhibit referred to was marked Defendants' Exhibit CM for identification.)

Mr. Strachan: ——is the scientific formula by which an exact computation could be made as to the matters.

Mr. Higbee would also testify that he had reviewed in detail all of the items appearing in the Winckler & Smith daily laboratory statistics, which are identified in this record as Exhibits I-1 to I-4, inclusive.

That from an inspection of these records, he determined that substantially all of the products of Winckler & Smith had been subject to adulteration through the use of water or sugar or acid, citric acid, or all three.

He would testify that from these records it appeared that the consistent practice was to buy fruit with high acidity, dilute the extracted juice with water to a predetermined level, then add sugar to attain a desirable sweetness.

That in other instances the procedure was to extract the juice, add water to get the desired volume, then to add citric acid and sugar in order to get a resultant product which would have the acidity and solids content which was predetermined by the formula. [3229]

When I say that his testimony would be that substantially all of the product had been so adulterated, I mean that the witness would testify that substantially 100 per cent of the production had been adulterated by the addition of ingredients, such as water, citric acid, or sugar.

The witness Higbee, further, would substantiate and corroborate the testimony of the witness Opal Comstock Smith, which was received without objection, and which your Honor, on your own motion,

struck. And would, in addition, substantiate the further testimony, which I offered by the same witness. And would substantiate in full the testimony on these subjects which I offered to introduce by the witness Gilbert.

Higbee would identify this document, entitled Amounts of Sugar and Water Added by Winckler & Smith to Stretch Their Canned Sweet Orange Juice, calculations based on 100 pounds of raw juice, as being a computation made by him and under his direction and supervision.

He would testify that the computations were correctly made from the contents of the Exhibits I-1 to I-4, inclusive.

The Clerk: I have marked the document Defendants' CN.

The Court: CN for identification.

(The exhibit referred to was marked Defendants' Exhibit CN for identification.)

Mr. Strachan: The further testimony would be that his [3230] examination of the exhibits in the "I" series indicated that similar adulteration occurred in the other products manufactured.

He would also testify that because of these adulterations the marking of the juice products as Grade A, the marking of these products without indicating the adulteration, would violate the Food and Drug laws and regulations thereunder.

The Court: Do you offer that?

Mr. Strachan: Yes, I offer that evidence, and I

offer the two exhibits that I have just had marked in connection with this offer.

The Court: May we incorporate the record heretofore made as the objection, insofar as pertinent?

Mr. Dixon: Yes, the objections made in the testimony of the witness Smith, Gilbert, Rodgers—I am not sure whether Rodgers was included therein—and the use of Exhibits "I" before referred to.

The Court: And incorporate, as well, these discussions out of the presence of the jury?

Mr. Dixon: Yes, your Honor. This, again, in my judgment illustrates that if this testimony were permitted to come into this case we would be chasing rabbits literally from now until Christmas.

The Court: Bacteria from now to Christmas.

The objection to the offer of proof is sustained. There [3231] are so many reasons why it is objectionable. I won't repeat them all.

Previously I mentioned Rule 12, that if you are going to defend on the basis of this product and unclean hands as was suggested, or illegal products, I am confident it would have to be plead under Rule 12.

In the statement of the issues the question was never raised.

We have an example here of two long intricate exhibits, CM and CN, exhibited, I take it, for the first time to counsel.

Mr. Dixon: I have never seen it even now, Judge.

The Court: But for the first time presented which have never been exhibited to counsel, and no

attention ever called that this was going to be an issue in the case.

There are so many reasons that I finally say this: A district judge has a right to be sustained, if he is right in his decision, even if wrong in his reasons, and I therefore humbly suggest, if this matter is reviewed, that if there are other reasons besides the multiplication of issues, besides the injection of exhibits never before exhibited to counsel, besides the matter of a defense of unclean hands, and violation of the law by the product, which wasn't even pleaded, that I may have the benefit, in sustaining my ruling, of those reasons that I may not have thought of, which would validly sustain my ruling on this offer of proof. [3232]

So the objection is sustained. [3233]

* * *

The Court: Before we adjourn, there is one thing I [3234] want to call to your attention, and you may make your suggestions.

One of the jurors said to the bailiff, "Which one is the Government lawyer?"

You know, you get discouraged. We have been trying a case for 26 days, and now a juror says, "Which one is the Government lawyer?"

And I think the bailiff replied, "There isn't any Government lawyer here."

It seems to me that I ought to, before we go any further, tell this jury that this is not a public antitrust case.

They may be confused because they know, or maybe somebody knows that Mr. Dixon used to represent the Government.

Mr. Dixon: Not to my knowledge.

The Court: I don't mean that they would know you personally, but you have had your name in the paper a few times representing the United States Government in the Antitrust Department.

Mr. Dixon: It has been at least three years now.

The Court: At any rate, I think they ought to be told again.

We tried to tell them to start with various things; that this is a private suit for damages, the situation with the plaintiff, that it is a corporation under Chapter X and there is a trustee. If necessary I will tell them the [3235] trustee, it is true, is in one sense a court officer, but this is not a Government suit; that the purpose of the action, an antitrust action, is a private action based upon alleged violation of the antitrust laws, which remedy, if one exists, after the proof is in, is given to the plaintiff to help enforce the laws, but it is a private suit.

Probably, again explain, as I mentioned, something about Walker's status. Because that may have led to the confusion. They know of the reorganization proceeding. There was some reference to him as a court officer.

I am debating, also, whether they shouldn't be told very frankly—this, now may cut both ways—told very frankly as to what happens in the event of a recovery; namely, that if there was a recovery, creditors of this corporation would come in first.

Expenses of—this one I want you to think about —expenses involved, and so forth, if there was a recovery in that amount, returned to the corporation. I don't know. You see my point?

We have been trying a case for 26 days, and then a juror says to the bailiff, "Which is the Government lawyer?"

Mr. Strachan: They probably think it is Mr. Figg.

The Court: He is a pretty good lawyer, but I don't think so.

Mr. Strachan: Your Honor, on that last matter, as to who the beneficiary would be, I think it would definitely be objectionable. [3236]

The Court: I realize we have got to stop somewhere, but I would like to make it clear. The evenness of it I thought was probably this. I only hazard this. If this jury thought Mr. Winckler was the plaintiff, I doubt if the plaintiff's luck would be as good as if they did not think he was. That is neither here nor there.

At least you think this over and give me some advice on what to tell this jury. Somewhere after 26 days they ought to know what kind of an action was filed. Do you agree?

Mr. Fisher: I wonder if a jury would after being told?

The Court: Well, this has been a hard case. It is a confusing case. We have come within the last few days to a problem of some multiplication of issues which certainly has had an effect upon this jury.

Whether it would have as much an effect as to know what this action is about or not, I don't know.

But this isn't like a case of a fellow that ran his car in front of a train and got hurt, with issues whether there was negligence, was contributory negligence, and what is the nature and extent of the injuries. We have got a complicated case.

All right, think it over. Maybe you can see me a few minutes before court in the morning. 10:00 o'clock tomorrow morning. [3237]

* * *

January 27, 1956, 10:00 A.M.

* * *

Did you have any discussion as to what I should tell the jury about this case?

Mr. Strachan: No, we haven't, your Honor.

The Court: About the government lawyer?

Don't you think I ought to say something this morning?

Supposing I merely point out that Mr. Dixon is not a government lawyer, and point out how the action was filed and how the trustee intervened?

Mr. Strachan: And that there are no government lawyers participating in the case.

The Court: Yes.

Mr. Strachan: Somebody in our group surmised—and it may be a fairly accurate surmise—that they got the impression that somebody in the back of the room was a government lawyer.

Mr. Dixon: I think it would be sufficient, your

Honor, [3242] to say that you don't know the basis for the question, but you thought it was clear that this is a private lawsuit in the sense that the government is not represented in the case, nor a party in any way to it; that Mr. Walker is the representative of the plaintiff corporation appointed by the court by reason of the proceedings under Chapter X, but that doesn't make him a government lawyer. If that is what they had in mind.

Mr. Strachan: I have no objection to what your Honor outlined.

The Court: Can't you leave it to my good judgment?

Mr. Strachan: I can.

Mr. Dixon: Yes.

The Court: I think the jury ought to be told. I think they ought to know this isn't a government antitrust suit.

Mr. Strachan: What your Honor suggested is quite satisfactory.

Mr. Dixon: Whatever you say is all right with me, your Honor.

The Court: I will try to be careful.

Bring the jury down. [3243]

(The following proceedings were had in the hearing and presence of the jury:)

The Court: The record will show the jury present in their proper places.

Ladies and gentlemen of the jury, one of you inquired or made a statement to the bailiff about who

was the Government lawyer. I want you to listen rather carefully.

This is not a suit by the Government. This is a private antitrust suit. It happens Mr. Dixon, who is attorney for the plaintiffs, some years back represented the Government, but he has not been with the Government for some time. If any misunderstanding arose out of that fact, let's clear that up.

So it is a private action, civil action for damages, based upon the antitrust laws, and the antitrust laws are so worded that there is a right given to a private person to bring an action for damages under the antitrust laws. Congress put that provision in to secure enforcement of the antitrust laws.

This suit started out by an action by Winckler & Smith corporation. That is the way the suit started. Then, as you heard, after the suit was filed—I can't give you the exact date, but at some later date the petition under Chapter X was filed by that corporation. The corporation then became subject to what we speak of generally as the bankruptcy laws, [3244] the Chapter X procedure.

At that time, when the petition was filed, Mr. Ronald Walker was appointed by the court, and by the court I don't mean myself, because I don't know whether—I want to be fair about this.

Mr. Fisher: I think it was filed in your court.

The Court: I think that's right. That's right. When we speak ordinarily of the court, we mean all the judges, but in this particular case, I believe it was filed in my court and I appointed Mr. Walker as the trustee for this corporation. Mr. Walker is not

Government officer. He is a court appointed officer a reorganization proceeding.

Then Mr. Walker, as the trustee, intervened in is suit, which is a procedure that is possible when suit is pending by the Winckler & Smith corporaon. Mr. Walker intervened as trustee, pressing hatever right he had as the one appointed in the organization proceeding to continue with the suit. Subsequently, Mr. Dixon came in—let me go back e step further. Mr. Irwin was generally Mr. Walker's attorney as trustee. Subsequently Mr. ixon came into the action representing the plainffs, and by the plaintiffs we speak of the trustee tervening, acting for the corporation, and whatver residuary rights, if any, the corporation itself d in the matter. We have not done any separation that.

So there is no Government lawyer. It is not a overnment [3245] antitrust suit. It is a private ntitrust suit relying upon the antitrust laws.

Is that satisfactory?

Mr. Strachan: Yes, your Honor.

Mr. Dixon: Satisfactory.

* * *

GERALD J. O'HANLON

called as a witness by the defendants, being first sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan:

Q. Where do you live, Mr. O'Hanlon?

A. In La Mesa, California.

Q. In what business are you engaged?

A. Food brokerage.

Q. How long have you been engaged in the food and beverage business?

A. Since I graduated from Marquette University in 1922.

Q. You were employed twice in a sales capacity by [3246] the Winckler-Smith Company, is that correct? A. I was.

Q. The first time was in 1949 to 1950?

A. Yes.

Q. Subsequently you were employed as sales manager in the summer of 1951, is that correct?

A. Right.

Q. How long did you continue in that employment?

A. I believe it was June—you mean 1951?

Q. Yes. A. About four months.

Q. Beginning in June and ending when? Perhaps in October? A. About October.

Q. Under what circumstances were you re-employed by Winckler & Smith, in 1951?

(Testimony of George J. O'Hanlon.)

A. I was with Kellogg Advertising Agency, and it was at the suggestion of Mr. Kellogg and Mr. Winckler, also, that we get together. I did with Mr. Winckler and I rejoined the organization.

Q. At the time you had had that discussion with Mr. Winckler, did he tell you what his plans for the company were?

A. I have to trust to my memory there. If I remember correctly, at the time he was planning to come into the frozen orange juice concentrate, and it was his plan to develop into [3247] that field because the field had been expanding and enlarging. I think that is about the sum and substance of it.

Q. Now, when you went to work in 1951, what was the first work that was assigned to you?

A. One of the first problems he had that I worked at was to dispose of surplus inventories on products that were in storage in various sections of the company.

Q. What products in particular were those?

A. They were canned lemonade, if I remember correctly, and orangeade, and some hot pack concentrate.

Q. Those were inventories which had been carried in the warehouses from a prior season or seasons, is that correct?

A. They must have been, yes.

Q. Did you dispose of those warehouse inventories?

A. I think we disposed of practically all of them.

Q. And how did you accomplish that?

(Testimony of George J. O'Hanlon.)

A. Well, we had—it was a case of unloading them, so to speak. We had to reduce our price in order to dispose of them.

Q. Can you recall generally at what price you disposed of those carried-over inventories?

A. Oh, possibly 60, 65 per cent of the original selling price. [3248]

Q. During the summer of 1951 if I understand it, the Winckler-Smith Company was not producing single-strength Valencia orange juice, at least in any considerable quantities, is that correct?

A. I don't think so.

Q. Do you know why it was, did you discuss with Mr. Winckler why it was that single-strength juice was not being produced?

A. I believe there was a shortage of fruit at the time.

Q. At that time what was the principal source of raw fruit furnished to Winckler-Smith Company—oranges?

A. I think he had a connection with a buyer who endeavored to buy fruit in various places, and I think he also had a connection with a company there in Anaheim.

Q. Do you know whether he ordinarily bought fruit from Morgan Ward?

A. Morgan Ward rings a bell as one of the sources of supply. He had been a source of supply, if I remember correctly, previous to that time.

Q. Do you remember that during that summer Morgan Ward had made an arrangement with Case-

(Testimony of George J. O'Hanlon.)

Swayne & Company for the production of single-strength Valencia juice?

A. That I do not know.

Mr. Dixon: I object to that, your Honor. [3249]

The Court: The witness says he doesn't know.

The Witness: That I do not know.

Q. (By Mr. Strachan): Do you know whether Case-Swayne was obtaining oranges from Morgan Ward at the time when Winckler-Smith was not getting oranges?

A. All I know about that is that I heard that was the case, but I definitely do not know.

Q. Where did you hear it?

Mr. Dixon: Just a minute. I move that any——

The Court: The answer may go out. It is hearsay.

Q. (By Mr. Strachan): Where did you hear this? At the plant?

Mr. Dixon: Same objection, your Honor, it is obviously hearsay testimony.

The Court: Sustained.

Q. (By Mr. Strachan): Can you tell us from whom you heard it at the plant?

Mr. Dixon: Objection, your Honor.

The Court: What materiality has that?

Mr. Strachan: I think it is quite material to show that Mr. Winckler was trying during this period to get Morgan Ward——

The Court: You are asking the man for hearsay. If you want to ask him specifically if he heard this from Mr. Winckler and then follow up, you may. But supposing he heard [3250] it from the janitor

(Testimony of George J. O'Hanlon.)

or some school boy that came by, what difference would it make?

Q. (By Mr. Strachan): Did you ever discuss this with Mr. Winckler, or did Mr. Winckler discuss it with you, that you can recall?

A. I know that at times because of the fact that fruit seemed to be difficult to get, Mr. Winckler mentioned that he was trying to get fruit from various sources, including Morgan Ward.

Q. Do you recall that in September of 1951, there was a commitment made by Winckler-Smith Company, through one of its brokers, to sell approximately a carload of single-strength orange juice to Ralph's Stores?

A. Through our Los Angeles broker, yes.

Q. Do you recall that Winckler-Smith did not have on hand juice to deliver?

A. Yes, sir, we could not fill the order.

The Court: Keep your voice up so that the men over here and the attorneys can hear you.

Q. (By Mr. Strachan): Did Mr. Winckler take that situation up with you and ask you to do something about it? A. Yes.

Q. What did he ask you to do?

A. He asked me to get in touch with the Exchange to see if I could get juice from them. [3251]

Q. In that conversation did he tell you that he had attempted to obtain juice, but juice was short and he hadn't been able to? A. Yes.

Q. What did you do after he asked you to get in touch with the Fruit Growers Exchange?

(Testimony of George J. O'Hanlon.)

A. I got in touch with a man I knew over there at the Exchange.

Q. Do you recall who that was?

A. I think I got in touch with Don—both Don and Howard—I can't remember their last name.

Q. Thompson? A. Thompson, yes.

Q. When you got in touch with them, what did you do?

A. I told them what our predicament was, we wanted to fill that order because the customer had been a very loyal customer, and in order to continue our relations with him we wanted to fill the order.

Q. What did Mr. Thompson say?

A. At first he said he didn't know whether it was possible to get any, but he would look into it and see if he could. Those aren't his words. And I called him back I think it was either the next day or the same day and asked him if he had succeeded in getting juice, and he said he was working on it. On the next day he called me back and said— [3252] wanted to check with me to see if we needed the quantity that we were requesting, and if what we were requesting was to fill a complete order. And he then said that he would be able to get it for us.

Q. And he got it and gave it to you. Did he tell you that juice was in short supply at that time, single-strength juice?

A. As I remember, he said, when I first spoke to him, that he wasn't sure whether he could get it, because it seemed to be in short supply, but he would do his best as a favor.

(Testimony of George J. O'Hanlon.)

Q. So as a result of doing a favor you obtained the juice, is that correct?

A. Yes, sir, we obtained it.

Q. And it was packaged under one of the Winckler-Smith private brands and delivered to Ralph's?

A. It was the Anagold brand.

Q. And it was delivered to Ralph's under the Anagold brand? A. By us, yes.

Mr. Strachan: That is all. Thank you.

Cross-Examination

By Mr. Dixon:

Q. Mr. O'Hanlon, when you were discussing taking over the sales managership for Winckler & Smith in 1951, did you [3253] know, or can you tell the jury whether you knew whether there were any plans on the part of Winckler & Smith to secure additional operating capital through the sale of stock?

A. Yes. If I remember correctly, Mr. Winckler told me that they were.

Q. And he informed you that plans were under way to secure additional capital, and so forth, by that means and method, is that correct?

A. I think it was the sale of stock.

Q. And that it was part of the plan of Winckler & Smith to expand its operations in the frozen juice end of the business, so to speak? A. Yes.

Q. Counsel asked you something about unloading some stocks, when you came with Winckler & Smith in, I believe it was June, early part of June, was it, of '51?

(Testimony of George J. O'Hanlon.)

A. I think it was about that time. [3254]

Q. The latter part of May?

A. No, it was not May. I think it was in June.

Q. These were stocks that were held over, still available from the previous season's pack, is that true, and had not been disposed of?

A. That is my understanding, yes. But it was not orange juice.

Q. It was these other products? A. Yes.

Q. Like lemonade? A. Right.

Q. And, of course, it isn't good sales policy to permit any product of that kind to remain on the shelves, is it? A. No.

Q. Or an inventory for any extended period of time? A. It is expensive.

Q. So that was the reason for disposing of the stocks then remaining, is that correct?

A. Yes, sir.

Q. At the discount price that you mentioned?

A. Yes, sir.

Q. Do you recall offhand how much there was of that?

A. No, I could not. I could not even guess at the total.

Q. I think you said in answer to a question of [3255] counsel that you believed there was a shortage of fruit, that is Valencia oranges, in 1951, and that that was the reason why Winckler & Smith didn't process any orange juice that year, is that correct?

Mr. Strachan: I believe my question, as the rec-

(Testimony of George J. O'Hanlon.)

ord will show, was limited to available for single-strength juice.

Q. (By Mr. Dixon): Do you understand my question? A. Yes, I do.

Q. What is your recollection of what you testified to?

A. That is my recollection, that there was a shortage of fruit for single-strength canning purposes, or at least he was having difficulty in getting fruit for single strength.

Q. That is my point. There was difficulty in getting fruit. Do you recall whether there was a question of price, too, at which fruit could be secured? In other words, the fruit that you are referring to, are you not, Mr. O'Hanlon, was the Valencia oranges that would be acquired and processed into single-strength orange juice by Winckler & Smith?

A. Yes.

Q. That is the kind of fruit we are talking about, isn't it?

The Court: You have got to keep your voice up.

The Witness: Yes. I am sorry.

Q. (By Mr. Dixon): Speak so the juror over at the far end can hear your answer, Mr. [3256] O'Hanlon. A. I will.

Q. Do you recall whether you ever had any discussion with Mr. Winckler about that phase of the problem of securing adequate amounts of Valencia oranges for processing purposes into single-strength juice by Winckler & Smith in 1951?

(Testimony of George J. O'Hanlon.)

A. No doubt we did, but I do not recall the discussions.

Q. I realize it has been nearly five years since that discussion occurred. But at any event you do recall there was some problem about getting Valencia oranges for processing purposes by Winckler & Smith? A. He wasn't getting them.

Q. Do you recall whether there was a larger amount of Valencia oranges generally available for processing purposes in single-strength juice——

A. No.

Q. ——in 1951? A. No, I do not.

Q. You don't recall and are not familiar with those facts? A. No.

Q. So when you said that you believed there was a shortage of fruit, that is Valencia oranges, in 1951, and that that——

Mr. Strachan: That is not a correct statement of the testimony thus far. [3257]

Mr. Dixon: Just let me finish my question, counsel, please.

The Court: Finish your question, but if you attempt to quote the witness, I right now don't remember what it was he said, but quote him as accurately as you can.

Mr. Dixon: My notes indicate that this witness stated he believed there was a shortage of fruit and that was the reason for not producing single-strength juice. That is my recollection. If I am in error, I will gladly stand corrected.

(Testimony of George J. O'Hanlon.)

Q. Will you tell the jury again, Mr. O'Hanlon, just what your testimony was in that respect?

A. My understanding of the situation at the time was that primarily Mr. Winckler's intentions were to go into the frozen concentrate. He seemed to be having difficulty in getting fruit for some reason or other. I am just trusting to memory, and my words are not his expressions at all.

Q. I understand.

A. His source of supply that he had been receiving fruit from previously was not supplying him with fruit.

Q. Did you have any discussion with Mr. Winckler in 1951 concerning processing Valencia oranges into single-strength juice?

A. We may have, but I don't remember definitely.

Q. In other words, you don't recall what conversations, [3258] if any, you had with him about that? A. No.

Q. Are you familiar with the capacity of producing frozen juice by Winckler & Smith?

A. The capacity he had for producing frozen juice?

Q. Yes, and comparing it with reference to the capacity to produce single strength juice during the processing season.

A. We started out in a small way because, I think, due to the fact that his capacity for producing frozen juice would have to be expanded as his business developed.

(Testimony of George J. O'Hanlon.)

Q. In any event, insofar as you now recall, there was no discussion between you and Mr. Winckler about not producing any single-strength juice at the plant in 1951, was there, and putting all the facilities, whatever they were, into producing frozen concentrate? A. Not entirely, no.

Q. Now, you testified with reference to your conversation with someone at Exchange Orange with reference to getting a carload of single-strength juice in 1951. That occurred about in September of that year, did it?

A. I think that was the month.

Q. So that at least as far as you now recall, Winckler & Smith did not have any single-strength juice available to fill that order, that it had processed at its own plant? A. Yes. [3259]

Q. That was the reason, one of the reasons you gave why you contacted Exchange Orange to get it?

A. Yes.

Q. Did you contact them after that for any more juice? A. No.

Q. Do you recall what the market was with reference to the demand for single-strength juice in 1951 insofar as Winckler & Smith was concerned? A. No.

Q. Do you recall whether you had inquiries from customers of Winckler & Smith concerning the securing of single-strength juice for sale to his customers in 1951?

A. I do not recall definitely. I do recall that we were sounding out the possibilities of obtaining

(Testimony of George J. O'Hanlon.)

business on single-strength juice. But I don't recall any inquiries from customers directly. [3260]

* * *

PAUL S. ARMSTRONG

called as a witness by, and on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

* * *

Direct Examination

By Mr. Strachan: [3262]

* * *

Q. What is your position in the Sunkist system?

A. I am general manager of Sunkist Growers, Inc.

Q. Are you also personally a grower of citrus products? A. Yes, I am, in a very small way.

Q. What is your professional training, Mr. Armstrong?

A. I graduated in horticulture at Michigan State College in 1915, and I have been associated in horticultural operations ever since.

Q. What was your first connection with the citrus industry or citrus products industry?

A. Shortly after leaving school I was employed as a dealer serviceman, one of the original dealer servicemen of the then California Fruit Growers Exchange, whose function it was to call on the retail trade throughout the country and stimulate better

(Testimony of Paul S. Armstrong.)

isplays, more reasonable pricing, and in other ways promote the sale of product.

Q. In what parts of the United States did you rve in that capacity?

A. I started in Boston, covered several places in ew England, and then later was in the Middle 'est, stationed in Cleveland and Chicago. [3263]

Q. When did you first come to the Los Angeles ea, what might be called the home office?

A. In the spring of 1917.

Q. In what capacity were you first employed re?

A. I was made manager or in charge of the aler service group of employees, and later became sistant advertising manager.

Q. Will you describe for the jury what the Sun- st system is and how it has acquired the various nctions that it performs for the growers who are members?

Mr. Dixon: If the court please, I don't want to ject, except I think the use of the word "system" re requires some definition, if it is going to be ed in this examination, because unless I know what is I must necessarily object to the use of the term.

Mr. Strachan: I will withdraw the question for e moment.

Q. (By Mr. Strachan): Are you familiar with e phrase "Sunkist system"?

A. Yes, sir, I have heard it used.

Q. Will you tell the jury what is denoted by e phrase "Sunkist system"?

(Testimony of Paul S. Armstrong.)

A. Well, it is an expression sometimes used by persons who are studying the industry to denote the group of functions that are performed on behalf of the grower in various corporations, [3264] some selling fresh fruit, some of them products, and some of them supplies. They are all referred to together as the Sunkist system.

Q. Will you describe to the jury what the Sunkist system is and what functions it has assumed?

Mr. Dixon: If the court please, I think I must object to that.

I have no objection to this witness testifying to what the Sunkist Company, the corporation defendant herein, does, what it is composed of, or anything else; but I think the use of the term, generally, "system" is misleading. At least I don't know what it means.

The Court: Let's not quibble about words. I understand from what the witness has said that the word "system" means two things, generally. It means, first, the organization that exists from the grower up through the exchanges, through the packing houses, the orange and lemon exchanges, and finally up to the Sunkist Corporation itself.

The Witness: Correct, your Honor.

The Court: Secondly, it means the functions that are carried on by various of the units of this organization?

The Witness: That is correct.

Mr. Dixon: May I ask one or two questions at this time?

(Testimony of Paul S. Armstrong.)

Mr. Strachan: I have no objection. [3265]

Mr. Dixon: Just in the interest of saving time?

The Court: If that is what is meant by "system," it is a term that we can use. Maybe it will save time to have one term to package up all that material.

Now what do you want to ask, Mr. Dixon? On voir dire?

Mr. Dixon: Yes.

By the use of the term "system," are you referring to anything different from any other marketing co-operative organized under the Capper-Volstead Act and operating under that act?

The Witness: Well, it refers to the particular system that has evolved for the service of this particular organization. It might be identical, it might be different in some respects than other systems set up for the same purpose by other commodities.

Mr. Dixon: Is it the same type of marketing organization that we have in other marketing co-operative organizations organized under the federal act?

The Witness: Generally speaking, such as you have in the dairy business and other markets.

Mr. Dixon: All right. Just one other question. By the use of the term "system," do you mean that in addition to the functions which those organizations perform, that Sunkist performs something in addition that is not performed by these other marketing organizations? [3266]

The Witness: I would have to know to which

(Testimony of Paul S. Armstrong.)

marketing organization you are referring. They are not identical.

Mr. Dixon: All of them.

The Witness: I couldn't make a general answer to that question.

The Court: We are not going to go into other co-operative organizations.

I take it, Mr. Armstrong, that there are walnut growers, raisin growers?

The Witness: Yes, in California and elsewhere in the country.

The Court: And in other states where there are other commodities that we are not familiar with here, they have similar organizations, and when I say "similar," in general terms?

The Witness: Correct.

The Court: They start out on the basis of these co-operative marketing organizations?

The Witness: Yes.

The Court: All right.

We will use the term "system," then, as applying to the structure of this set-up from the grower on up through the districts, the packing houses, the exchanges, EOP, ELP, Sunkist, and also as referring to the functions that are respectively carried on and performed by the various parties. [3267]

The Witness: That is right.

Q. (By Mr. Strachan): Will you describe for the jury the growth of the functions of the Sunkist method of doing business and how the functions are

(Testimony of Paul S. Armstrong.)

performed by the various component parts of the Sunkist organization?

A. I answered a number of questions put by Mr. Dixon when I was appearing as a witness, and I wish to not be repetitious, but I think it might be helpful if I ran briefly through the evolution of this industry and the part that the Exchange, as we call it, has played in it over the years, and I will avoid and only allude to things that I covered in more detail in your questioning.

Oranges were introduced into California at the time the Mission fathers came here from Mexico and brought with them the economic plants that they had known of in Spain. That was along about the time of our Revolutionary War in 1776, and from there to 1800.

The first orange grove that was recorded of any consequence in this state was planted at the Mission San Gabriel in 1804. At that time, of course, there was no transportation elsewhere, and the fruit thus grown was for strictly local consumption.

And the industry did not assume commercial importance until the coming of the railroads in 1877, when we had our first transcontinental railroad connection in Southern California. [3268] It was stimulated by the having of such transportation, and having proven that oranges could be grown here to good advantage. There was an immediate expansion in the acreage, in the expectation of serving the whole nation instead of the locality. And they overdid it,

(Testimony of Paul S. Armstrong.)

so it wasn't long before the supply outstripped the then demand and something had to be done.

The first organizations formed were local packing houses, because no one grower was large enough, himself, to undertake these complicated things, either in preparing for market or in marketing itself, so they grouped together. And I think oftentimes they were aided in that by the fact that they had previously had to group together for other purposes, such as irrigation, so they were conditioned for that sort of thing.

There were a number of scattered associations, there was one out here in Pomona, in the '80s, another one in Riverside, and they sprung up here and there, serving the growers in the community in which they were located, owned by the growers themselves, directed by the growers themselves, and operating in the growers' interests.

Attempts were made as early as the middle '80s to group these scattered associations into an integrated marketing agency or group of some kind, but because each of these associations was very individualistic and was very sure that the [3269] fruit they produced was better than the fruit that anybody else produced—which they still think—why, they didn't get together very easily, and it wasn't until the crisis of the early '90s, in fact, the panic of 1893, that this grouping finally took on cohesive form and we saw the organization of the Southern California Fruit Exchange, which was nothing but a grouping of a number of these local associations

(Testimony of Paul S. Armstrong.)

that already existed for the purpose of carrying out marketing functions, because the associations were principally for the purpose of harvesting the fruit, and putting it in shape to be marketed. [3270]

Q. By the association, you mean the packing houses?

A. The packing houses, I should refer to in every case, although they are called associations in our language.

For purposes of contact and administration, these scattered associations were grouped into regions, which were called in the early organization districts, and they became members, each in their own locality, of a so-called district exchange. There was one in Orange County, there was one in Riverside County, there was one or two in Los Angeles County, one in San Bernardino County—there were seven all together, which were sort of the charter members of the California Fruit Growers Exchange.

The district exchange was the responsible agency to determine the sale of the fruit that had been prepared for shipment by the member associations of that district, and these districts operating together, the seven of them, set up a central organization, first known as the Southern California Fruit Exchange, whose function it was to provide the sales representation in markets either by salaried officers or through brokers, and to handle a number of other functions which I will go into in a moment. But they also served as the liaison between the local

(Testimony of Paul S. Armstrong.)

associations and also the source of our government, so to speak.

The growers who belonged to a local packing house governed that packing house by a board of directors elected [3271] from among their number, and they served without compensation, and still do, and they selected a manager who is a salaried man, and with him select the staff.

Then in turn the district exchange is governed by a board of directors representing one or two from each of the member packing houses in that district, and they serve also without compensation. They select a manager and the limited staff that the district requires.

Then the central organization, which we called Exchange now called Sunkist Growers, is governed by a board of directors consisting of one designated representative from each of the districts. At that time there were seven districts. In 1951, which is the date we are considering here, there were 25 districts. The directors of the central organization also serve without compensation. They represent their constituents just like a legislative representative would in establishing the policies of the organization. They employ the manager and in consultation with him the rest of the staff.

Q. Are those directors themselves citrus fruit growers?

A. Yes. They are citrus fruit growers and are elected by the district which sends them to the central organization and are subject to change each

(Testimony of Paul S. Armstrong.)

week, if they wish to, at the pleasure of the district which sent them.

Now, the creation of that organization in the '90s solved temporarily these distressing problems of low returns. [3272] I remember the old gentleman that I first met when I came out here who was then president of Sunkist, or California Fruit Growers Exchange, Mr. Storey of Alhambra, who said that he received in 1892 only 10 cents a box for his oranges. They had high hopes of what the organization could accomplish by federating together, and they did accomplish a great deal.

We went through another series of years when the returns were quite satisfactory, and that resulted in another upsurge of planting, because under the American way of life, we can choose our occupation and where we want to pursue it, and anything that looks promising, people already in it expand their own operations, and then other people are attracted into it. So it was not long after the formation of the Southern California Fruit Exchange in 1893, that we were confronted with another crisis.

Meanwhile, they had established offices in various parts of the United States and Canada. We now have 50 such offices, salaried offices. We have brokers besides in some places. They have succeeded in broadening the basic distribution of citrus fruit, but even with that the expanded plantings out here and the plantings in Florida, which were then be-

(Testimony of Paul S. Armstrong.)

coming more prominent, caused there to be an excess of supply over demand.

It was under those circumstances that the board of directors decided, with some misgivings, to resort to advertising, [3273] which was thought to be quite an adventure when applied to a natural fruit. I covered that subject before, so I will not go into that.

The Court: You mean that is when you acquired the Sunkist name and embarked on the Sunkist advertising?

The Witness: Yes, that's right. That was in 1907, your Honor, and we started advertising in the spring of 1908.

While the start was very small in terms of dollars, the results were very dramatic in the opinion of the directors at that time, so they continued to advertise and increase the appropriations, and the result of all that was that we got quite an increase in production again, not only here, but in Florida.

The Court: I was in error. You were advertising the Sunkist name from 1907?

The Witness: That is correct.

The Court: And then later on you acquired the sole right to the Sunkist name from some other group that also had a claim on it?

The Witness: The California Packing Corporation, I think, also used the name Sunkist for dried fruits and canned fruits, and had a registration in the Patent Office for that class of goods, just as we had for citrus fruit.

(Testimony of Paul S. Armstrong.)

The Court: What year was it you acquired that?

The Witness: 1950. [3274]

The Court: All right.

The Witness: As I say, I will not go into the advertising subject in detail, but suffice it to say as a result of all these efforts and the discovery of vitamins and the importance of orange juice in child feeding, and a lot of other things too numerous to mention, the growth of this business has really been spectacular. Of course, along with that has gone a growth, as there had to be, of production, so that in the citrus industry nationally we have had a doubling of production every 10 years for the last 40 years. That has presented quite a challenge for any marketing operation, and that is why we needed some of these things that I have been describing to implement those efforts.

Now, in addition to sales, which is the principal function of the exchange, we have related departments. For instance, traffic is one. Traffic came into the picture very early. A person unacquainted with such things doesn't know how to route railroad cars so that you can protect a through rate so that you have to have a professional do that. The same thing is true of collection of claims. It is hard for anyone not experienced in those things to do an adequate job.

So that closely related to sales was the traffic direction of all shipments which were made on behalf of the packing houses, but which were watched over

(Testimony of Paul S. Armstrong.)

by the central organization in the progress and distribution. [3275]

It is also highly important to have a fan-like distribution on all the railroad systems of the country all the time, so that if the weather is adverse one place, or conditions are very favorable some other place, you have what we call overnight diversions, cars available close by that can be diverted to such places. That goes on all the time, and still does.

Of course, we had from the beginning, I believe, although it precedes my personal experience, accounting facilities and the other operations that are required to run any business.

The next department that I recall having been established after advertising was the field department. That department was set up primarily to be advisory to the associations in their handling operations and pass along the good ideas from one to the others. They also had the primary responsibility of seeing that the standards established by the board of directors to govern the quality of fruit growing under the Sunkist trade-mark would be observed. They were sort of a referee in that respect, because that trade-mark which soon became very much esteemed by the public and therefore valuable to the one privileged to use it, was not owned by any one association, but was owned by all of them as a group, and it became the duty of the directors to establish standards under which such trade-mark might be used. The field department was the department in

(Testimony of Paul S. Armstrong.)

our organization that was charged [3276] with that responsibility.

Starting from very small beginnings, we now have quite a substantial field department that not only carries out the original functions, but also is engaged in very extensive testing and experimentation on better ways of preparing fruit for market, better packaging, better protection against decay, because citrus fruit is a perishable product, and is very sensitive to adverse conditions in transit or during distribution.

The skin of a sound orange will not decay, but if it is scratched, it will decay for sure, and therefore all of the fruit has to be picked and handled by gloved hands.

That covers the principal departments that we have within the organization, except for research, which was set up in some later years, and that was charged with responsibility of learning the chemistry of citrus fruits, both for by-product purposes and also for the purpose of refining of handling practices in the fresh fruit industry.

Now, as time went along, after the fresh fruit situation had been pretty well systematized, if I could use that word, although it is never finished——

Q. What you have described up to now relates primarily to the handling and marketing of fresh fruit as fruit, is that correct?

A. Yes. In those days for the most part no attention [3277] was given to the so-called culls that were discarded and were an inevitable part of the

(Testimony of Paul S. Armstrong.)

business, but no utilization was made of them. But it was not very long before the growers, the directors wondered whether some salvage couldn't be secured out of the fruit that inherently was not of a quality that was suitable for the fresh fruit market.

So they started with lemons in 1915, because the citric acid made in Italy was a well known article of commerce, and everybody knew how to make it. You could read about it in chemistry books. That was likewise true, although it was a little more difficult, to make essential oil of lemon, which was used in flavoring extracts, and a lot of other uses well known before Exchange was organized.

There were some who were pretty dubious about adventuring into things other than fresh fruit. In a democratic organization like the Exchange or Sunkist, those points of view are very freely expressed and very strongly held by the directors. So all of them would not go into this by-products venture, just some of them. So the packing houses shipping lemons that had confidence in the salvage that might be secured from the unshippable fruit through that means, formed the Exchange Lemon Products Company which was owned by those packing houses who decided to support it. The other packing houses did not support it and had no part in it.

The same thing happened with oranges the next year in [3278] 1916, when there was set up a small group, less than all of our packing houses shipping oranges, who decided to undertake the development on a salvage basis of recoveries from oranges that

(Testimony of Paul S. Armstrong.)

were not suitable for shipment to the fresh fruit market because of size or grade or surplus, even.

They had a harder time of it in some respects than the lemon group, because there were no established articles of commerce that anyone knew how to make that required oranges. I remember they started out with trying to make vinegar out of oranges, like you make it out of apples and make it out of pears. That was not an economical thing, we soon found.

The next adventure was marmalade, which was even worse.

Q. What do you mean that marmalade was even worse?

A. We had no trouble selling the marmalade, but when we got all through, we were selling about one or two cents of oranges in a 25 cent glass of marmalade, and the rest was labor, glass, transportation and sales expense. So we would have had to swamp the country with marmalade to make a dent in the tonnage of oranges available for that purpose.

So that caused a temporary set-back to the Orange Products Company, and they almost ceased operations. But the original group that had grubstaked them and some others decided they were going to make another try, and they reorganized, I think it was in 1921, and have been going ever since.

Over the years, with the help of our research department, [3279] they have both, both Lemon and Orange, learned how to make things that no one knew how to make at the time they started. The chemistry has been learned, the producing technique,

(Testimony of Paul S. Armstrong.)

the storage technique, and markets have been developed. That is a story in itself which I won't attempt to go into here. Not only in the food products field, but in pharmaceuticals and, of course, with vitamin C, which was unknown at the time I started with Sunkist, became one of the main reasons for justifying the consumption of citrus fruit, and it is now available in various forms other than fresh fruit.

That, I think, Mr. Strachan, briefly covers the evolution of the organization. [3280]

* * *

Q. (By Mr. Strachan): Mr. Armstrong, I think you said at the outset the products processing corporations were set up and owned by less than all of the members of the Sunkist organizations?

A. That is correct. And it came about for the reason that I mentioned, that they weren't all sold on the soundness of the enterprise.

But another situation developed in the depression years of the '30s.

Mr. Dixon: If the court please, I have no wish to interrupt this approach to the problem, but it seems to me by this time we should be able to proceed with the usual method of question and answer.

The Court: Do you have some further history to sketch in this matter?

Mr. Strachan: That is right. [3281]

The Court: Will it be brief?

Mr. Strachan: Yes.

(Testimony of Paul S. Armstrong.)

The Witness: Very brief.

The Court: All right. Overruled.

The Witness: At the beginning the fruit that went to the by-products destiny was what we called the culled, off sizes or blemished fruit, or something of that sort. In the '30s we got into terrific surplus problems, as did many agricultural producers, and then it was necessary to send to by-products outlets, for conversion into something on a salvage basis, fruit that was perfectly suitable for the fresh market, both by appearance, size, and every other consideration.

When that happened, it was necessary to make these products outlets available for all of the packing houses, respectively, of oranges and lemons, and then later grapefruit, and that was when they became an integral part, you might say, of the Exchange organization in one way or another.

Q. (By Mr. Strachan): In about 1932 or '33 there were governmental restrictions placed on the quantities of fruit that might be marketed in fresh form, is that true?

A. Yes, in the early years of the depression, in 1932 and 1933, Congress considered various types of legislation to alleviate the distress of farmers generally, and they passed in 1933 the Agricultural Adjustment Act, and at the same time [3282] the National Industrial Recovery Act, for the benefit of industry.

We were one of the first industries to take ad-

(Testimony of Paul S. Armstrong.)

vantage of the provisions of the Agricultural Adjustment Act, and we have operated ever since 1934 under a marketing agreement set up under that statute and supervised and operated in some respects by the government itself, the purpose of which is to regulate supply and demand to the benefit of both the consumer and the producer, so that the markets will not be alternately glutted and starved, and we will have a more orderly distribution.

Q. The products companies which are owned by the Sunkist organization have processing facilities which they own and directly operate, is that correct? A. That is correct.

Q. In addition to that, it has been the policy, has it not, of the Sunkist organization to utilize on occasion the facilities of independent processors?

A. Yes, indeed it has. In fact, at the time our own facilities were established there was a considerable body of opinion that thought it would be better to rely entirely on outside processors. But the trouble with that was if conditions were unfavorable they were not interested in processing, and we couldn't dispose of the fruit that must go to that outlet. [3283]

Mr. Dixon: If the court please, I know there has been a broad discretion here in telling the background and history of this organization. I have no objection to it. But it seems to me now that this witness begins to express opinions which directly relate to independent processors and their con-

(Testimony of Paul S. Armstrong.)

nection with this industry, and at this point I must object and ask that any questions that relate to that phase of the industry and the relationship of Sunkist to it be conducted on the basis of questions and answers.

The Court: All right. I think that is what counsel has started to do at this time.

Mr. Strachan: Yes, I was.

The Court: Proceed.

Q. (By Mr. Strachan): Will you tell us the program that has been adopted by the Sunkist organization to make use or avail themselves of the use of outside processing facilities of independent processors?

A. It was and is the general policy of the organization to utilize to the fullest extent possible the facilities of outside processing groups to the extent that we had fruit available for that purpose.

The reason for that is that we wanted to take advantage of their own skills and manufacture, and in the development of new products and in the broadening of markets.

We built a plant of our own for both lemons and for [3284] oranges, and we at times even shared our scarity, in years when the fruit supply was inadequate for all, with some of these outside processors, particularly those who had come to rely upon us as a regular thing for raw material or fruit supply, because we didn't want——

Mr. Dixon: If the court please, I object to that, "those who had come to rely upon this company."

(Testimony of Paul S. Armstrong.)

Now, obviously that is a conclusion and is hearsay and goes wholly outside of any permissible answer to the question, as I see it, and I object to it on the ground stated.

Mr. Strachan: I don't think it is hearsay. I think it is a straightforward statement of the policy established by the organization through its board of directors.

Mr. Dixon: My objection, your Honor, in case it isn't clear, is to that part of the answer of this witness where he said that processors had come to rely on Sunkist.

They are obviously not a part of the Sunkist organization, they are not within the co-operative group at all, and if we are to have any statements or questions of that kind, I want to fully inquire into them by direct evidence.

Q. (By Mr. Strachan): When you say——

The Court: Wait just a moment. I am just thinking about this.

Mr. Strachan: Pardon me.

The Court: I am going to strike that part of the answer [3285] at this time, grant the motion to strike, and instruct the jury to disregard it.

We will discuss it in the absence of the jury at some later time.

Q. (By Mr. Strachan): Will you explain the economic considerations which lead to the policy of making use of the independent processors' facilities?

(Testimony of Paul S. Armstrong.)

Mr. Dixon: If the court please, I certainly object to that question, economic considerations.

I have no objection to any testimony as to what this company did and the facts that he can testify to of his own knowledge. But we are not concerned here with economic policies of this defendant as they may apply.

The Court: Objection sustained at this time.

What did the defendants do?

Mr. Strachan: All right.

Q. What did the defendants do?

The Court: Limit your answer, also to what they did and not the background of why they did it.

Q. (By Mr. Strachan): What did Sunkist do with regard to engaging the services and facilities of independent processors?

A. We had as a general policy the encouragement of independent processors, and supplied raw material or fruit for their processing requirements. Especially those who were [3286] our regular customers.

Q. In general, there were two different kinds of contracts made by Sunkist with the so-called independents, were there not? One of those was a hiring contract under which the contractor took the fruit and processed it for the account and risk, and returned the product to Sunkist; is that correct?

Mr. Dixon: If the court please, I think that this witness, having been in this business as long as he has, is fully competent to tell this jury what arrangements they made and with what companies

(Testimony of Paul S. Armstrong.)

they made them, if he knows those arrangements and the details of his own knowledge.

Otherwise, I object to any further general characterizations and leading questions of this witness at this stage of the examination.

The Court: Objection sustained. The question is leading.

Reask the question.

Q. (By Mr. Strachan): Will you tell us what kind of arrangements what types of arrangements were made between Sunkist and independent processors?

The Court: What period are you talking to? We have been talking from 1700 on. Let's bring it down to within some reasonable period of time.

Mr. Strachan: All right. [3287]

Q. (By Mr. Strachan): When did Sunkist first make use of the facilities of independent processors?

The Court: Approximately? We don't care about the exact date.

The Witness: We sold fruit to independent processors as soon as they existed, which I would guess was about sometime in the 20's.

Q. (By Mr. Strachan): And you have continued to sell fruit at your regular prices to processors ever since, is that right?

A. Yes. Our preference was to sell to them.

Q. Under conditions when the independent processors couldn't or wouldn't buy, did Sunkist make any other arrangements?

(Testimony of Paul S. Armstrong.)

Mr. Dixon: Now, if the court please, I object to the form of that question. It obviously assumes something that counsel knows is not proper.

The Court: Objection sustained, but not on that ground. I will let counsel bring this thing down to currently. How about the years beginning, say, 1949?

Mr. Strachan: All right.

The Court: To get a starting place. In the year 1949, what types of processing agreements did you enter into? Just give us the types, if they fit into categories.

Mr. Strachan: Would that be, your Honor, the period [3288] say from 1949 through 1951?

The Court: That is what I had in mind.

Mr. Strachan: That is what I had in mind, too.

Mr. Dixon: If the court please, I hate to object here constantly at this stage of the examination, but I must object to the use by counsel of the term processing in connection with any agreement, because that assumes a lot and is open to different constructions and may be in fact a question for the jury to determine. I have no objection to contracts or testimony as to what the actual arrangement was, if this witness knows, but to characterize the arrangement as a processing agreement in his question seems to me entirely to assume a question to be perhaps decided by this jury. I object to the question on that basis.

Mr. Strachan: The question is that of the court.

The Court: It was the court's question, and it

(Testimony of Paul S. Armstrong.)

is like the numerous stories of the lawyer who said, "Your Honor, if you are asking that question on behalf of my opponent, I object to it. If you are asking it on my behalf, I withdraw it."

I think the objection is well taken, because one of the issues in this case is whether or not the Silzle and TreeSweet contracts were actually processing contracts or whether they were contracts for the sale of juice to Silzle and TreeSweet, or oranges made into juice. Let's call them contracts [3289] with independents. Is that an agreeable term?

Mr. Strachan: It is all right with me.

The Court: Contracts, and by that term we will mean contracts concerning product oranges. That is what we are talking about, isn't it? Is that right? Product lemons, and so forth?

Mr. Strachan: Yes.

The Witness: Earlier testimony has shown, and I have so testified myself, that Sunkist as such did not make processing contracts with anybody. Our concern was with selling fruit as fruit, and Sunkist growers did sell fruit to other processors. Arrangements other than that were made either by Exchange Lemon or by Exchange Orange.

The Court: What types of contracts were there beginning, say in 1949 on up through 1951 with independents? Did they fall into one or more categories generally?

The Witness: I would say generally there were two categories. One was a participating type of contract where the fruit was furnished by the Ex-

(Testimony of Paul S. Armstrong.)

change Orange, for example, and the manufacturing cost was furnished by the processor, and then they shared in the ultimate results of sale on some basis that was worked out in this understanding.

The other type was simply hiring the facilities of the outside processor to expand your own capacity which was insufficient. You just hired them to do it on what we called [3290] a custom pack basis. Those arrangements were all made by these companies and not by me, so I speak only in generalities.

The Court: Now, that second category, was there a breakdown of that into two types, one where EOP hired the independent to process and paid the independent for it, and the canned juice went back to EOP, and another kind in which the independent was given an option to buy the canned juice? Was there a breakdown in those two categories, or was that all one kind?

The Witness: I wouldn't feel competent to answer that because that deals with the particulars of the contract, and I am not sufficiently familiar with it.

The Court: They were not made with your consent?

The Witness: They were not made with my knowledge or consent. Made with my knowledge of the fact that they were made, but not the terms.

The Court: Go ahead.

Q. (By Mr. Strachan): Mr. Armstrong, in setting up these arrangements with processors or with independents for furnishing fruit and having it

(Testimony of Paul S. Armstrong.)

processed other than through the sale, the direct sale of the fruit to the independent, was there ever any intent or object on the part of Sunkist to grant or withhold such an arrangement for the purpose of eliminating any independent from the field of competition?

Mr. Dixon: Now, if the court please, counsel obviously [3291] knows that that question is improper. It calls for a conclusion of this witness and directly invades the province of this jury. I object to it on those grounds.

The Court: Of course, the witness has said that the contracts were not made with Sunkist. However, there is an integrated relationship here, and an official of Sunkist should certainly be permitted to state whether or not he had a certain intent or did not have a certain intent, or his organization did or did not. Objection overruled.

The Witness: Could I ask the reporter to read the question?

The Court: The question can be answered yes or no, I think.

Read the question, Mr. Reporter.

(Question read.)

The Court: Well, on being reread, I think you have to limit it to this witness' participation and intent as far as any of his activities.

The Witness: There was no such intent, I can say that.

The Court: Other than that, I don't think the

(Testimony of Paul S. Armstrong.)

question is proper when you say intent on the part of Sunkist. I think it has to be tied in with the individual person.

Q. (By Mr. Strachan): Do you personally know——

Mr. Dixon: Just a moment. I move that the answer of the witness that he put in there be stricken from the record, [3292] your Honor.

The Court: I think we are being super-technical.

Mr. Dixon: I am. I have to be at this stage, your Honor. I regret it. This witness, your Honor, has further testified he did not participate in the making of any of these arrangements, yet he has answered as to the intent of those arrangements.

The Court: That is something you can argue about.

Mr. Dixon: I think the answer should be stricken and the jury instructed to disregard it.

The Court: Maybe I am being super-technical on this question.

Mr. Dixon: If I understood your Honor's ruling——

The Court: I am going to change my ruling. This is a one-question proposition and then you are going on to something else, aren't you?

Mr. Strachan: That's right.

The Court: You have a problem of a corporate defendant. There is no individual defendant in this case. There is a corporate defendant charged with acts alleging injury. Under the law, it is a double-barreled proposition.

(Testimony of Paul S. Armstrong.)

Mr. Dixon: That's right.

The Court: Either the act was intended to do a certain thing, or it had the necessary effect of doing a certain thing. Therefore, the defendant should be allowed to put on proof [3293] from the corporate defendant as to one or both of those aspects. The question going through my mind is how do you prove the intent of a corporate defendant?

On the plaintiff's side, you prove it through the acts of the individuals. I think, therefore, in rebuttal the individual official should be entitled to say neither he nor any act of the corporation that he was in any way connected with had any intent. That is what I was thinking about.

Mr. Strachan: That is precisely it.

The Court: His connection with it. Let me see if I can ask the question. I know he has disclaimed he has had anything to do with these contracts, but that is again a question of fact for the jury.

The objection is sustained. The answer will go out.

Let me see if I can ask the question. Well, you ask it again, Mr. Strachan.

Q. (By Mr. Strachan): Do you know of any instance in which any member of the Sunkist organization or any of its components made or refrained from making an arrangement for the use of independent processing facilities for the purpose of or with the object of eliminating any independent processor from the competitive field?

Testimony of Paul S. Armstrong.)

Mr. Dixon: Just a moment. I renew my same objection.

The Court: You may have the same objection. Overruled.

The Witness: No. There was no such intent on my part [3294] or on the part of anyone connected with the organization, to my knowledge.

Q. (By Mr. Strachan): Mr. Armstrong, will you describe the conditions under which the Florida citrus fruit industry is conducted and describe the effect of the Florida citrus fruit industry upon the marketing of California citrus fruit and citrus fruit products?

A. Citrus fruit has been grown in Florida about as long as it has in California, and the industry has been of large proportions for a long number of years. The fruit is of a different type and it is less expensive to produce citrus fruit, oranges I am speaking of now, or grapefruit in Florida than it is in California.

The reasons why that is so are because of much lower taxes, lower wage rates for labor, lack of necessity for irrigation, because they operate under natural rainfall, but be that as it may, they can produce oranges per hundredweight in Florida for substantially half of what we can in California.

Therefore, they were very quick to seize upon the products outlets for oranges in the form of single-strength orange juice and single-strength grapefruit juice, and later when the techniques were established of frozen concentrated orange juice. They

(Testimony of Paul S. Armstrong.)

have made the going very difficult for us as far as recovering the cost of the product. [3295]

I earlier testified that at no time have we been able to secure a price for products oranges which returned to the grower an average cost of producing such oranges.

One of the principal reasons why that is so is because of Florida competition. They establish the national price level and we must live under that price level.

Mr. Dixon: If the court please, I hate to object, but it seems to me that this answer is just replete with conclusions and is not in answer to the question. I will not object further if your Honor feels that this line and this answer is proper.

The Court: Well, the witness is qualified as an expert in this field. Those matters which are matters of ipinion, I think the jury will be able to pick out, and those matters which are as to matters of fact, of course, you have the general rules that apply to anything of that sort. But limit your discussion of the Florida situation to general points, and then let your counsel ask the specific question as we go on. Have you finished now about the Florida situation?

The Witness: Yes. [3296]

Q. (By Mr. Strachan): After the development and successful commercial application of the technique of packing concentrated frozen orange juice, how did that affect the competitive situation as between California and Florida?

(Testimony of Paul S. Armstrong.)

Mr. Dixon: Same objection, your Honor.

The Court: Overruled.

The Witness: Florida became very large producers of both single-strength orange juice and of frozen orange juice concentrate. And at the time we are talking about, 1951, while I do not have the exact figures in mind, I would think that the volume produced in Florida at that time, although the business was then young, was about 30 million gallons per year.

The Court: Of what?

The Witness: Frozen orange juice concentrate. I don't remember the figures as to single-strength juice, which was an earlier product.

California, to my recollection, has never reached in excess of 4 million gallons of frozen juice concentrate in a year.

And we could only sell our product, I might add, at prices that were competitive with products of similar character produced from Florida fruit.

Q. Will you tell us how many growers there are who are members of the Sunkist [3297] organization? A. In 1951?

Q. Yes, in 1951. A. Approximately 12,000.

Q. Can you tell us the average acreage of the groves of these 12,000?

The Court: What is the purpose of this? What bearing does this have on the issues of the case?

Mr. Strachan: We have here a group of small operators, and I want to bring out by this witness how it is that through this Sunkist organization

(Testimony of Paul S. Armstrong.)

they are able to co-operatively solve the many problems.

The Court: That is a good answer, Mr. Strachan.

I am going to permit the answer, but I am going to instruct the jury now what I instruct them at the time I give them their final instructions.

You are not to be governed by sympathy or prejudice or public opinion in your decision in this case. All persons, including corporations, stand equal before the law, and in your decision in this case you have a lot of things to decide, but one of your considerations will not be that ultimately Sunkist and EOP may be owned by 12000 owners who have any particular size of acreage.

Let's get that straight right now. I am going to permit this, because I want you to have a picture of this whole thing. My general conclusion has no bearing on the issues of [3298] this case at all, any more than if you were trying a personal injury case in deciding for plaintiff or defendant, you say, well, which is the most well to do, which one is better established, is one a corporation, one an individual, shall we give the plaintiff a big recovery because the defendant is a corporation, or shall we give the plaintiff no recovery because the defendant is some poor little guy who comes in here, or shall we give a verdict for the defendant because of something about the plaintiff?

That is not the way you decide, justly, cases. You

(Testimony of Paul S. Armstrong.)

jurors are judges of facts, just like I am a judge of the law.

I want you to know entirely the picture of the defendants, but one consideration before you will not be the effect of what you do on anybody concerned.

The objection is overruled.

The question now was the relative size of the groves of these 12,000 members, average size.

The Witness: Approximately 16 acres per individual.

Q. (By Mr. Strachan): Are the services that are provided through the Sunkist system available on an equal basis to all of the member growers?

Mr. Dixon: Your Honor——

The Court: You may have the same objection. Overruled. [3299]

The Witness: Yes.

Q. (By Mr. Strachan): Does Sunkist or do any of its components, by that I mean Exchange Orange Products and Exchange Lemon Products, pay any dividends on the stock issued by them?

A. Sunkist itself has no stock, has no capital stock. It is a non-profit co-operative organization.

The affiliates, such as Exchange Orange, have capital stock, all of which is owned by Sunkist now, since it was acquired from the packing houses shipping oranges, as I explained before.

The Exchange Lemon Products Company, at the time of this action under discussion, was a corpora-

(Testimony of Paul S. Armstrong.)

tion, the stock being owned by the associations o packing houses shipping lemons.

Q. No dividends are paid on the capital stoc of either Exchange Orange or Exchange Lemo Products, is that correct? A. No, no dividend

Q. Does the Sunkist system deal in the produc of any who are not members of the association?

A. No, it does not.

Q. The exchange system, as it was then know or the Sunkist system now, is referred to, is it no in a pamphlet issued by the United States Depar ment of Agriculture?

A. The co-operative program has been fostere by government [3300] for a long period of year and the application of those principles has bee studied in respect to this commodity, that is, or chard crops, and in respect to field crops, and dir crops, and so on. So in the course of their promotio —and it is really a promotion on the part of govern ment of co-operative development—they have is sued bulletins to inform others similarly situate how they, also, might organize and operate.

One such bulletin is the result of an extensiv study made by the Farm Credit Administration, so called then, a part of the Department of Agricul ture, called the California Fruit Growers Exchang System, which explains in a rather voluminous bulletin the structure, the operations, the contracts and all other pertinent information, including many statistics.

(Testimony of Paul S. Armstrong.)

They recommended that form of operation. It was considered sort of a model.

Q. What use has been made of that pamphlet that you have just described?

A. It is widely distributed by the Department of Agriculture on request. We maintain a quantity in our office which we send out to general inquiries not only in this country but throughout the world.

Q. Is it used as a source material——

The Court: What has that got to do with the issues in the [3301] case? I have been giving you a lot of latitude, but what conceivable issue would the fact that this book might be used as source material pertain to?

Mr. Strachan: I want to show it is a standard handbook used and accepted for use in institutions of higher learning, and that is the basis for offering it in eviednce.

The Court: What does it prove? Namely, it has been used in institutions of higher learning. What else does it prove?

Mr. Strachan: I say it is a foundation for receiving the pamphlet, the government publication, in evidence.

I have had it marked as Exhibit CO, and on the basis of the evidence given, and the evidence offered now, I offer the exhibit in evidence.

Mr. Dixon: I of course object, your Honor.

The Court: Sustained.

Mr. Strachan: That is all.

The Court: That is Exhibit CO. That is the

(Testimony of Paul S. Armstrong.)

document you are referring to, is it not, Mr. Armstrong?

The Witness: Yes, it is, sir.

The Court: Objection sustained. [3302]

* * *

Friday, January 27, 1956—2:00 P.M.

* * *

Mr. Strachan: If it please the court, I have one short witness I would like to put on out of order.

The Court: You may.

Mr. Strachan: Mr. Myron Kunin.

MYRON KUNIN

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Myron Kunin, K-u-n-i-n.

Direct Examination

By Mr. Strachan:

Q. Where do you live?

A. 10550 Toledo Way, Los Angeles 24.

Q. In what business are you engaged?

A. I am a private investor.

Q. How long have you occupied yourself in private investing? A. Since 1946.

Q. Do you recall having some time in 1951 or 1952 talked with Mr. Nicholas Winckler about the pos-

(Testimony of Myron Kunin.) —

sibility of your making an investment in the Winckler-Smith Citrus Products Company? [3304]

A. I do, sir.

Q. Did you have a meeting with Mr. Winckler?

A. Yes, I did.

Q. Where was the meeting?

A. In my office.

Q. Who was present at the meeting?

A. I don't recall who, in addition to Mr. Winckler, but I do think that there were one or two others with Mr. Winckler at the time.

Q. Will you tell as nearly as you can what was said by Mr. Winckler and what was said by you in the course of this meeting?

A. Mr. Winckler presented his balance sheets and several sheets of paper showing his experience over a number of years, and after a review of the papers, I told him——

Mr. Dixon: If the court please, I think the answer is not responsive to the question as to what was said by Mr. Winckler and this witness.

The Court: Overruled. Go ahead.

The Witness: After reviewing the papers, I had concluded that——

The Court: Just tell us what you said.

The Witness: All right, Judge. I said that I was not interested.

Q. (By Mr. Strachan): Did you at any time at that [3305] meeting say that you were not interested in investing simply because the Winckler-Smith

(Testimony of Myron Kunin.)

Company did not have the raw fruit available to them? A. No, sir.

Mr. Strachan: That's all. Thank you. There may be some questions from the other side.

Mr. Dixon: No questions. [3306]

* * *

Mr. Strachan: I tender Mr. Armstrong for cross-examination.

Mr. Dixon: No cross-examination, your [3307] Honor.

* * *

The Court: The record will show the jury absent.

The Clerk: I have marked a series of 66 exhibits for identification, your Honor, beginning with Defendants' Exhibits CP through CZ, inclusive; DA through DZ; inclusive; and EA through EZ, inclusive; and FA through FC, inclusive.

(The exhibits referred to were marked Defendants' Exhibits CP through CZ; DA through DZ; EA through EZ; and FA through FC for identification.)

The Court: These are all papers from the files of the plaintiff corporation?

Mr. Strachan: Those that have been marked from CP to EI are of that class.

Mr. Dixon: I must say for the record that we disclaim any responsibility whatever for CP as being from the files of the plaintiff, which is the first exhibit.

Mr. Strachan: I am wrong on that.

The Court: Let me look at them.

Mr. Strachan: That is a letter from the files of the defendant.

Mr. Dixon: I think the rest of the exhibits, marked commencing CQ——

The Court: Let's take them as they go. The first is CP. It will be stipulated, first, as to the foundation, that [3313] this is a letter written by Arthur Johnson Company to California Fruit Growers Exchange?

Mr. Dixon: Your Honor, I know nothing about it, except what appears on the face of the document. It appears to be one received by Exchange, so I will stipulate to that effect.

Mr. Strachan: I will make that representation.

The Court: You could produce a witness who would so identify it?

Mr. Strachan: I could.

The Court: What do you offer it to prove?

Mr. Strachan: I offer it to show that at the date of that letter the defendants had notice of the objections that were being raised to the quality of operation and manner of operation of the Winckler & Smith Company.

The Court: State briefly your grounds of objection.

Mr. Dixon: Objection on the ground that it is not the best evidence, and it cannot be admitted for the truth of the statements contained therein, your Honor, which I understand is the purpose for which it is offered. Objected to on that ground.

The Court: Objection sustained. It is also dated September 24, 1945.

Now, let's see if we can take a group. CQ to how far are supposed to be from the records of the plaintiff company?

Mr. Dixon: Through EI, your Honor. Commencing with [3314] CQ and ending with EI.

The Court: As to these, is foundation waived as far as coming from the records of the plaintiff company?

Mr. Dixon: It is, your Honor.

The Court: These are offered for various purposes, are they?

Mr. Strachan: Yes, they are, your Honor. The first one is offered——

The Court: CQ?

Mr. Strachan: Yes, CQ is offered to show that the year 1949 was an abnormal one as far as the competitive situation of California Valencias with Florida products was concerned.

The Court: Mr. Dixon?

Mr. Dixon: Objected to, your Honor, on the ground it is not the best evidence; that the exhibit is signed by the president of the plaintiff corporation who was in court and available for cross-examination concerning anything contained in said letter. [3315]

The Court: Objection sustained. Also on the further ground that the wording itself is a future prophecy. It is not any statement of fact by the witness. "We are optimistic, and so forth, that this year might prove an exception." It is not even a

recitation of a fact. It is a recitation of some prophecy. Objection sustained.

Now, CR, what do you offer CR for?

Mr. Strachan: CR is offered likewise as evidence that the year 1949 was not a normal one for the market for Valencia orange products in competition with Florida.

The Court: Same objection?

Mr. Dixon: Yes, your Honor. I might say in the interest of saving time that as to any document that purports to be signed by the president of the plaintiff corporation, who was available here in court for cross-examination during the course of the trial by the defendant, that we object to the admission of any of these documents that may fall in that category on that ground, that it is not the best evidence.

The Court: Of course, if there is impeaching matter in it, that is different.

Mr. Dixon: Yes.

The Court: But you add that statement to the objection heretofore made, right? You add that objection to what was heretofore said?

Mr. Dixon: Yes, your Honor, on the same ground. [3316]

The Court: Well, this again is prophecy. The third paragraph, "California industry will not be able to supply the total demand." That is obviously what might be called sales talk. I see no relevancy. Objection sustained to CR.

CS is offered to prove what?

Mr. Strachan: CS is offered to show that the 1949 season was not a normal one with respect to

the competitive position of California on orange products. Also, that the financial condition of the company was unstable at that time. It had not been able to work out satisfactorily credit arrangements. Fruit was purchased, contracted for purchase from the Independent Fruit Growers at prices below the market price that was posted by the Fruit Growers Exchange.

Mr. Dixon: Is it offered, counsel, for the truth of the statements contained therein, and are you willing to so stipulate, that the facts alleged therein are true and it is being offered for that purpose?

The Court: Is it offered for the truth of the facts contained therein?

Mr. Strachan: No. It is offered on the theory of admissions, your Honor, admissions against interest.

Mr. Dixon: Well, then, it must be the truth of the statements contained therein. In other words, your Honor, what I am saying is this, that if this document goes in, the plaintiff does not want to be deprived of the right to itself [3317] refer to this document and not have the defendant claim that they have only admitted certain facts in the document as being true after I make reference to it.

The Court: I don't agree with your position. If it goes into evidence, it can be used by either side. When it is being offered as admissions, plaintiff could use it and defendant could use it, but that doesn't mean the defendant has to stipulate that what is in there is true, particularly where he is offering it as alleged admissions on your part.

However, if it goes into evidence, you are cer-
inly entitled to use it. That's the way I see it.
Now, I don't know what the admissions are. What
articular admissions are you relying on? [3318]
Mr. Strachan: I didn't hear you, your Honor.
The Court: What particular admissions?
Mr. Strachan: For example, in the third para-
raph, "* * * the importance of sweetened juices,
amely orange juice and blended juice, has increased
nsiderably over the past," due to the conditions in
lorida, and the favorable conditions in California.
nd the paragraph beginning at the bottom of the
rst page is an admission of the financial instability
f the company and its limited financial resources.
nd the last paragraph, the "additional informa-
on" covers an admission that they were obtaining
uit at prices lower than the Exchange Orange
ted prices.
The Court: It is dated in June of '49. It seems
me too remote on the question of any admission
to the financial condition.
Mr. Strachan: We take the position that from
e moment they sold their plant under this ex-
mely unfavorable lease-back arrangement, they
d no financial stability, and that that finally
ght up with them two years later. The situation
t increasingly worse.
I don't think the financial condition was created
ernight, as the other exhibits show, and this is an
mission immediately after the first reorganiza-
n proceeding that the financial picture was bad.

The Court: If I admit it, I will then not let you offer [3319] further evidence to contradict it.

Mr. Strachan: To contradict it?

The Court: I am not going to create these situations——

Mr. Strachan: None of the matters that I have been referring to here are what we want to contradict; they are admissions that we want to establish, facts we want to establish.

The Court: I don't know. Mr. Dixon seems interested in it.

Are you objecting to it?

Mr. Dixon: I don't know as I do, your Honor, provided, as I said, that we can have equal access to the use of this document and refer to it. At least not have the defendants come in at that time and say that they only offered part of it and plaintiff cannot make use of some of the other statements that are contained in this document.

That will be true as to all of these offers, your Honor, so that is why I am taking the time, at this time, to have it clearly understood that if I do not object to the introduction of some of these documents, that we may be able to use them, too.

The Court: If they go into the record, I don't know how either side can be prevented from using them in their argument. You may read it one way and put your interpretation on it, and the defendant may read it another way and put [3320] their interpretation on it. But if it goes into evidence it is in the record.

Do you object to CS?

Mr. Dixon: No objection.

The Court: CS received in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit CS.)

The Court: What is CT offered for?

Mr. Strachan: On the abnormality of the 1949 season contained in the second paragraph.

Mr. Dixon: Objection to this, your Honor, on the grounds previously urged to Exhibit CR.

The Court: It doesn't say that. If this goes into evidence, it could be argued that this Winckler juice was so good that they are getting orders every day from every part of the country, people that never traded with them before. It doesn't say anything about any abnormal condition.

You could argue that. Plaintiff could argue something else.

Are you offering it?

Mr. Strachan: I am offering it.

Mr. Dixon: Objection on the grounds previously stated, your Honor.

The Court: Objection sustained.

CU. [3321]

Mr. Strachan: CU is a so-called Anagram, also offered to show that the 1949 market was abnormally favorable for California, referring particularly to the first paragraph.

It also shows the extremely high price prevailing for the orange juice, at $3.95 for 12/46-ounce cases.

The Court: Is there objection to CU?

Mr. Dixon: Objection, your Honor, on the

ground that this type of thing, which is a sales statement in 1949, and is being offered for the truth of the statements contained therein, is not the best evidence, and the contents thereof do not tend to prove or disprove any of the issues in this lawsuit.

The Court: Overruled. CU received in evidence.

The Clerk: Defendants' Exhibit CU.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit CU.)

The Court: CV, an Anagram?

Mr. Strachan: The portion under the heading "California Trend:

"Orange juice market is up. We are entirely sold out on our pack of California Valencia orange juice. The demand for blend is strong and sales on grapefruit juice exceed the supply."

Offered for that passage and also showing the price of orange juice quoted in the box up in the upper left-hand corner.

The Court: Is there objection?

Mr. Dixon: Yes, your Honor, on the grounds previously stated.

The Court: Overruled. CV received in evidence.

The Clerk: Defendants' Exhibit CV.

(The exhibit referred to was marked Defendants' Exhibit CV and received in evidence.)

The Court: CW, what is that offered for?

Mr. Strachan: That is a letter that is offered to show broker complaint against the product. I am offering it, but with your Honor's ruling with re-

gard to the other letters relating to navel juice, for that reason it should be excluded.

The Court: Sustained. The objection to CW sustained on the same ground as others of that kind.

CX. This is a reply, apparently, to CW. Right? [3323]

Mr. Strachan: This is put in to show the effect of Florida conditions on the market and to show, also, the effect of the development of the——

The Court: Are you looking at the same thing I am? CX is a letter from Winckler & Smith.

Mr. Strachan: I had those clipped together, your Honor. I thought the reply was part of CW. I am sorry.

The Court: I am wondering now if our numbering system is all off?

Mr. Strachan: No, the numbering is all right.

The Court: You don't offer CX?

Mr. Strachan: Yes, I offer CX, which is a reply to CW.

Mr. Dixon: Objected to.

The Court: Sustained. I can't make any rhyme or reason out of it, I'll be very frank with you. Mr. Dixon, I wouldn't object to CX. It shows Mr. Winckler is being very honest. But I can't follow you men. I have been trying to. Objection to CX sustained.

CY?

Mr. Strachan: CY is offered to show the effect of the Florida conditions on the California market, and also the effect of the development of frozen concentrate on the processors of single-strength juice,

making canners' operations less profitable or unprofitable. [3324]

The Court: Read me what part you have in mind.

Mr. Strachan: Up at the top. "Production of single-strength juice remains extremely small due to high fruit prices paid by the low temperature concentrators, which puts the squeeze on the canners and makes production unprofitable."

The Court: Is there objection to CY?

Mr. Dixon: Yes, your Honor. This is dated February 18, 1950. Counsel is offering it for the truth of the statements contained therein. It is not the best evidence.

The Court: Objection overruled. CY received in evidence.

The Clerk: Defendants' Exhibit CY.

(The exhibit referred to was marked Defendants' Exhibit CY and received in evidence.)

The Court: CZ? That is a navel juice problem, isn't it?

Mr. Strachan: Yes, it is.

The Court: Same ruling. Objection sustained.

Mr. Dixon: Well, your Honor, maybe I won't object to this.

The Court: Pardon me. I didn't hear an objection. I was trying to save time.

Mr. Dixon: I have no objection to it.

The Court: CZ received in evidence.

The Clerk: Defendants' Exhibit CZ.

(The exhibit referred to was marked Defendants' Exhibit CZ and received in evidence.) [3325]

The Court: DA?

Mr. Strachan: Is CZ received, then?

The Court: CZ is received.

DA, what is it offered for?

Mr. Dixon: What is it being offered for, counsel?

Mr. Strachan: I haven't read it for some time. This is a complaint that the navel juice was not up to the standard for navel juice.

Mr. Dixon: Objection on the ground previously made with reference to this type exhibit.

The Court: All right, DA objection sustained.

DB?

Mr. Strachan: That is offered as an admission that the development of frozen concentrate techniques had been injurious to the packers of single-strength juice.

Mr. Dixon: If it is being offered for that purpose, we certainly object to it on the ground that it is not the best evidence.

The Court: It is not being offered for impeachment?

Mr. Strachan: For the purpose of contradicting the testimony that the single-strength juice was a profitable item. Particularly, I am offering it for this:

"Due to big production and acceptance in frozen concentrate, prices and production were thrown out

of balance in Florida to such an extent that none of [3326] the packers of single-strength juice were able to operate with a profit or any assurance of delivery of merchandise."

Mr. Dixon: Objected to on the further ground that the letter to which this is a reply is not made a part of this exhibit, so it is completely unintelligible without the letter of the 7th referred to in the exhibit, to which DB purports to be a reply.

The Court: Objection sustained.

Mr. Strachan: Did your Honor rule?

The Court: Objection sustained. DC?

Mr. Strachan: I am offering DC as an admission contained in the following portion of the Anagram:

> "Unfortunately the crop is short this year and this year a great portion of the fruit available to processors is going to be used by the frozen concentrators who can afford to pay more for fruit than canners. For this reason fruit supply will be short."

Mr. Dixon: You are offering it for that purpose, counsel?

Mr. Strachan: I am offering that admission.

Mr. Dixon: Admission of what? What is it an admission of as far as the issues of this case are concerned?

The Court: First, is there any issue about the crop being shorter in 1950 than in 1951? [3327]

Mr. Strachan: It is not the short crop that I am talking about particularly. One of the issues here

is why Mr. Winckler went out of business, and it is our contention one of the reasons was that he did not or would not or could not use his single-strength plant and produce profitably in competition with the frozen concentrators.

The Court: This is the year 1950?

Mr. Strachan: That's right, and in 1950 that trend had started, and it was not until late summer or the fall of 1951 that he started in production of frozen concentrate. This is an admission that the frozen concentrate competition for process fruit was putting the squeeze on the single-strength manufacturers.

The Court: Objection?

Mr. Dixon: Objection, your Honor, yes. Some of these things cut both ways, but I don't like to encumber the record.

The Court: If this was in 1951, there wouldn't be any question about it, but you offer it allegedly for an admission, and I don't think there is any dispute about this insofar as the year 1950 is concerned. [3328]

Mr. Strachan: Well, it is establishing the fact by their own statement that the frozen concentrates were taking up the fruit at prices too high for the single-strength operators to pay, and that commenced long before he finally went broke. Over a year before that.

The Court: Overruled. DC received in evidence.

The Clerk: Defendants' Exhibit DC in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit DC.)

The Court: DD. What part of this?

Mr. Strachan: This is to show the availability of markets for California juice because of the shortage of supply in Florida; and also is offered for the prices quoted on the Winckler-Smith products, $3.65 for 12/46-ounce cans of orange juice.

The Court: The same objection?

Mr. Dixon: Yes, your Honor.

The Court: Objection overruled. I consider it pertinent only insofar as the prices are concerned.

The Clerk: Defendants' Exhibit DD admitted in evidence, your Honor?

The Court: DD in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit DD.)

The Court: DE. [3329]

Mr. Strachan: DE is offered to show that there was no good will attached to the Anagold label, or at least in some markets the Anagold label was a liability rather than an asset.

The Court: Do you offer the letter to prove the truth of the facts contained therein?

Mr. Strachan: I am offering it as showing that a broker reported facts therein stated to Mr. Winckler in December of 1950.

The Court: Objection?

Mr. Dixon: Objection, your Honor, yes, particularly on the ground that it refers to navel orange juice.

The Court: To what?

Mr. Dixon: Particularly on the ground that it refers to navel orange juice.

The Court: refers to navel orange juice, and it is not the best evidence of the truth of the facts contained therein. The objection is sustained.

DF.

Mr. Dixon: What is the date of this?

The Court: I suppose the part you are interested in is the little slip attached thereto?

Mr. Strachan: That's right.

Mr. Dixon: Your Honor, if this is to be made clear as to part, I think we ought to have an exhibit that is clear as to [3330] all of the Anagram, because this is just like emphasizing something, and I frankly can't read the rest of the exhibit, and I don't know——

Mr. Strachan: I wish it were a clearer print, myself.

Mr. Dixon: I object to it on that ground.

Mr. Strachan: That it is a poor print?

Mr. Dixon: Yes, and that you can't read most of it.

You picked out a part out here which will be clearly readable, and I don't know whether the rest of the exhibit would make it more readable, or refer to this, or not, because I frankly can't read it.

We are certainly entitled to know what is in the exhibit that you are offering.

Mr. Strachan: If the objection is to the rider that has been attached——

Mr. Dixon: No, it isn't to the rider. The objection is to the exhibit itself, that it is unreadable for

the most part, and you have apparently been able to read the part that you want, but the rest of it is not readable.

Mr. Strachan: I can read it all. I will have the rider taken off, if it is thought that gives undue emphasis.

The Court: That objection I would sustain.

You can submit another.

Is there any other objection to it?

Mr. Strachan: I would like to have Mr. Dixon produce [3331] the original.

Mr. Dixon: You are not going to ask me at this time to find this exhibit, counsel?

The Court: Didn't you make the Anagram from an original?

Mr. Strachan: We made this facsimile copy from the Anagram and returned the Anagram to the plaintiff. So we can't get a better copy unless we have the original Anagram.

Mr. Dixon: Counsel, at this stage of the trial, to now ask the plaintiff to go through boxed records, whatever it is, to find the original, or whatever it is, is imposing a burden that I don't think we should have to assume.

I think you have the clear obligation to furnish to this Court and to the jury, if it is admissible, and to counsel, readable copies of the documents that you want to use.

Mr. Strachan: As long as they are your documents, I can't do that, unless you make them available.

Mr. Dixon: Then you could have the originals, and given us time and notice to try to find them.

The Court: Your request is denied that the plaintiff look for this Anagram, but you may be able to work out——

Mr. Strachan: I will ask that the rider attached there be removed, and I offer it for the purpose I stated.

Mr. Dixon: My objection is not to the rider.

The Court: I can't make out parts of it, either.

Mr. Strachan: The part for which it is offered certainly nobody [3332] has trouble reading. I don't think there is anything there that with some care cannot be read. I certainly never heard, before, that it was a ground of objection to admissibility that a fine or perfect facsimile copy be used.

The Court: It wouldn't be a ground of objection to an original, but it would be to the use of a purported copy.

However, this statement that you have here, again I can't understand all the fuss. It cuts as much one way as it does the other.

Mr. Strachan: It shows, in our theory, that the difficulty in obtaining fruit in the year 1951 was due to a scarcity of fruit for processors. It says right there that there is a scarcity of fruit for processors in California never experienced before.

The Court: And plaintiff's argument is that notwithstanding the situation the processors were in, Silzle and TreeSweet didn't have that problem.

I have trouble following you.

Mr. Dixon: Frankly, your Honor, I do not have

any real objection to many of these documents that the defendant is offering, because I think some of the material contained therein, if usable by either party, can be used for both sides; but my objection to the document is that, first, it doesn't comply with the rules of the Court as to photostats, which I think provide that they must be black on white, and [3333] the real objection is that this is a document that, if it was ever resorted to or used, we ought to be able to read the whole thing.

The Court: The objection is sustained, unless you want to get a better copy.

Mr. Strachan: I am informed that Mr. Smith was asked to get these documents out so that we could get better ones, and I don't think there is any reason why Mr. Dixon shouldn't make them available to us.

Mr. Walker: When was Mr. Smith asked?

Mr. Strachan: About two weeks ago.

Mr. Williams: Two or three weeks ago.

Mr. Strachan: And he has the documents all selected.

The Court: Check with him.

Mr. Strachan: We have checked with him.

The Court: Where is Smith?

Mr. Dixon: Do you mean where is he today?

The Court: Yes.

Mr. Dixon: I don't know.

The Court: Has he an office?

Mr. Walker: Probably at home. He is trying to get a vacation in.

Mr. Strachan: I understand the same request was made of Mr. Dixon two weeks ago.

Mr. Dixon: I don't think there was any request of me, [3334] counsel.

The Court: It may be possible to work that out. The objection is sustained.

Mr. Strachan: Is the objection sustained because of the quality of the print, or because of the contents, your Honor?

The Court: Sustained because I can't read a lot of that matter there, and I don't think a jury could, either.

DG, what is this offered for?

Mr. Strachan: That is to show the effect of the Florida market on California prices in 1951; and also to show the prices at which Winckler & Smith were quoting California juice.

The Court: Is there objection to it?

Mr. Dixon: Here, again, your Honor, the objection is that part of this copy that I have, frankly, I can't read it. It seems to me that the documents that are offered at least should comply with the rules of this Court.

The Court: This is better than the other one. However, the date——

Mr. Dixon: What is the date?

Mr. Strachan: The date is May 26th.

The Court: What year?

Mr. Strachan: 1951.

The Court: I am looking at my copy. Maybe yours is better. See that the original copy has the

date on it. The [3335] objection will be overruled and it will be received in evidence.

The Clerk: Defendants' Exhibit DG.

The Court: On the condition that the date can be made legible, and you may write it in.

Is there any doubt as to the date?

Mr. Strachan: If you look over in the heading that is above the prices, it says "Prices effective as of June 2, 1951."

The Court: Yes, that gives us the year. And the date is March or May?

Mr. Strachan: It is May. May 26th. Prices effective June 2nd.

The Court: I will write in the date. DG received in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit DG.)

The Court: DH.

Mr. Strachan: DH is a letter received by Mr. Winckler from Merchants Acceptance Corporation, it is a creditor, asking for an explanation, or calling attention to the poor comparative showing made up to that time that year compared with the year before, and asking for an explanation.

May 2nd is a reply, which among other things contains the statement that "last year we had a very unusual situation due to the inadequate Florida stocks which permitted us to [3336] run a large volume during the winter months. This has never happened before and it is not anticipated in the future."

It shows the bad financial condition of the company in 1951 as compared to 1950, and also shows that the prior year had not been a normal one, because of the lack of normal competition from Florida.

The Court: What is the objection?

Mr. Dixon: I don't know as I have any, your Honor.

I have no objection to this exhibit.

The Court: Received in evidence, DH.

The Clerk: Defendants' Exhibit DH.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit DH.) [3337]

The Court: DI?

Mr. Strachan: DI is offered as a report made in the regular course of business by a broker reporting two facts. One is the buyer is dissatisfied with the product. Second, that the competitors were quoting lower prices, and that the lower price quoted as of June, 1951, was $2.90.

Mr. Dixon: Well, your Honor, objection. This is offered for the truth of the statements contained therein?

Mr. Strachan: I offer it to show what was reported.

Mr. Dixon: Then we certainly object to it on that ground.

The Court: Objection sustained, either on the ground of what was reported or on the ground of the truth of the facts contained therein.

Mr. Strachan: I did not understand the ruling. I didn't hear you.

The Court: You mentioned price. In that sense, you are certainly offering it for the truth of the facts contained therein, and the objection will be sustained on that ground.

As far as any notice to Winckler, he said nothing in there that would make it admissible. Objection sustained on both grounds.

DJ?

Mr. Strachan: That is the reply. It is offered on the same theory DI was, and also offered to show what the price [3338] quoted as of June 12 was by Winckler & Smith.

Mr. Dixon: If DI is objectionable, certainly DJ shouldn't go in.

Mr. Strachan: I am offering them separately.

The Court: I suppose $2.95 refers to 12/46's. What is the $1.32½? What does that apply to?

Mr. Strachan: That is 24/2's, I believe, your Honor.

The Court: Is there any objection?

Mr. Dixon: The plaintiff's object in the first place to BJ without BI being in evidence to connect up the two letters, which show what the matter is that is being discussed, where the juice is not supposed to be up to par. The prices are not sufficiently identified to indicate what the product is that is being priced. Objected to on that ground.

The Court: I will overrule the objection to DJ. If you want DI to go along with it——

Mr. Dixon: Yes, your Honor. If you are going

to overrule my objection to DJ, then I withdraw my objection to DI.

The Court: Fasten the two of them together, Mr. Clerk, so they won't get lost, and they will both be received in evidence.

The Clerk: Defendants' Exhibits DI and DJ in evidence.

(The exhibits referred to were marked Defendants' Exhibits DI and DJ and received in evidence.)

The Court: DK? [3339]

Mr. Strachan: DK is offered primarily for the last paragraph which reads:

"California has a big Valencia crop. We know the only way to move it is to be competitive with Florida."

Mr. Dixon: What is this one, counsel?

The Court: DK?

Mr. Dixon: I have before me DK.

Mr. Strachan: The last paragraph.

Mr. Dixon: It certainly is wholly irrelevant, your Honor.

The Court: I don't know what it proves.

Mr. Dixon: I don't know either.

The Court: What does it prove? A big Valencia crop?

Mr. Dixon: That is already admitted.

Mr. Strachan: It shows a big Valencia crop, but it also shows the California canners are going to have to meet the competition of Florida, that is what, and Winckler's intention to meet it. A part

of the evidence has been that the Florida canners broke the market on single-strength juice by dumping a large quantity of juice at low prices, and that is why it became unprofitable for Winckler & Smith.

The Court: Objection sustained. It is cumulative and any bearing on the issue is too remote.

DL, what do you think you have in here?

Mr. Strachan: That is offered only for the prices, your [3340] Honor. It shows another quotation by that time by Winckler & Smith, June 30th, on the orange juice.

Mr. Dixon: I don't think I have any objection to that, your Honor.

The Court: DL received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DL and received in evidence.)

The Court: DM?

Mr. Strachan: DM is offered to show that Winckler & Smith in July was quoting prices on carload lots of unsweetened California Valencia juice at certain prices.

Mr. Dixon: I don't think I have any objection to this one here, your Honor.

The Court: DM received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DM and received in evidence.)

The Court: DN?

Mr. Dixon: What is this?

Mr. Strachan: That is offered to show the price

quoted on July 11, 1951, on Valencia juice, and also for the admission contained in the section headed New Price, which reads:

"Please note that we have revised our prices on our entire citrus line. This revision was made possible by more favorable fruit supplies."

Mr. Dixon: I don't think I have any objection to that [3341] one, your Honor.

The Court: DN received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DN and received in evidence.)

The Court: DO?

Mr. Strachan: That is offered to show complaints made with respect to the quality of the product.

Mr. Dixon: Objected to on the ground that it is not the best evidence of the facts for which it is offered.

The Court: Well, if it goes in, it has to go in with a limitation. You have got these in already. Do you want another one?

Mr. Strachan: Yes, sir.

The Court: DO received in evidence. Objection overruled.

(The exhibit referred to was marked Defendants' Exhibit DO and received in evidence.)

The Court: Mr. Clerk, remind me to tell the jury about DO.

Mr. Dixon: That is only for so-called impeachment purposes, your Honor?

The Court: Impeachment purposes.

DP?

Mr. Strachan: Well, I put that in because it was a reply to DO. I will not offer it unless Mr. Dixon asks us to.

Mr. Dixon: Just a moment. No, I don't think, since the [3342] DO has been offered for that purpose, that it is necessary to put in DP.

Mr. Strachan: I won't offer it.

The Court: DP is withdrawn.

DQ, what part of this Anagram?

Mr. Strachan: I am putting that in to show an offer to quote prices on orange juice on request, also for the statement that, "Aparently the way Florida is footballing, the price of citrus juice supports what we said on June 23rd."

The Court: Where is that?

Mr. Strachan: DQ.

The Court: Where is it about Florida?

Mr. Strachan: The third paragraph.

The Court: The third paragraph?

Mr. Strachan: And also the last paragraph.

Mr. Dixon: I have no objection to it, your Honor.

The Court: DQ received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DQ and received in evidence.)

The Court: DR?

Mr. Dixon: I have no objection to this one, your Honor.

The Court: DR received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DR in evidence.)

The Court: DS? [3343]

Mr. Dixon: I have no objection to this one likewise.

The Court: DS received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DS and received in evidence.)

The Court: DT?

Mr. Strachan: I put that in to show the distressed basis for disposing of carry-over inventory mentioned by Mr. O'Hanlon on the first page.

On the second page, I put it in for the admission contained in the following:

"California citrus juice season has been delayed this year due to excessive Florida inventory which has forced prices to an unreasonably low level for citrus juices."

Mr. Dixon: This letter, your Honor, represents some of the things that I wanted to at least bring out through this witness on cross-examination when he was here this morning, and this was one of the letters.

The Court: Then you have no objection?

Mr. Dixon: Well, I don't like to have to put witnesses on the stand to explain some of these things which can be easily explained, and that is the only reason I am considering whether to object to it on the ground that the witness who wrote this letter was before the Court this morning for examination on this question. I am going to object

to it on that [3344] ground, your Honor, because I did not have a right to cross-examine. This witness who wrote the letter was here and therefore the best evidence concerning anything contained therein was readily available to the defendant. They now seek to bring in through the back door something concerning which direct evidence was available to them this morning when this witness was offered by them as part of their case and I did not have an opportunity by cross-examination this morning to even go into the situation that is referred to in this letter, and for which they are now seeking apparently to offer the letter as proof of the facts contained therein.

The Court: Well, of course, it would ordinarily be admissible as an admission if there are any admissions, but it seems to me it should have been considered at that time. The witness was here available for examination.

Objection sustained to DT.

DU, what is this offered for?

Mr. Strachan: Well, this is offered because it contains an explanation of the inability to get fruit which is entirely inconsistent with the position taken by the plaintiffs, and that was true of the letter I last offered, particularly in the third paragraph, where it says,

"The condition as existing up to the present time has been brought about by the fact that too high a percentage of fruit has been going into concentrate [3345] and we have not been able to obtain

fruit at a price that would enable us to be competitive on the production of single-strength juice."

They were caught between the single-strength and the concentrators.

Mr. Dixon: But TreeSweet wasn't. We have no objection to it.

The Court: DU received in evidence.

(The exhibit referred to was marked Defendants' Exhibit DU and received in evidence.)

The Court: DV? [3346]

Mr. Strachan: That is put in because of the admissions that the company had heavy local bookings which made it unable to quote on unsweetened orange juice as of the date, which is August 24, '51.

Mr. Dixon: There again, your Honor, I don't know as I have any objection to it. The trouble is, it is quite obvious to me what this telegram refers to.

The Court: It isn't to me. It looks as if O'Hanlon was doing a little sales puffing, that is what it looks like. Is that the way you read it?

Mr. Strachan: No.

The Court: What do you think it means, heavy local bookings?

Mr. Dixon: What is it being offered for, counsel?

Mr. Strachan: Offered to show that there were reasons other than refusal of a processing contract that were responsible for inability to sell the juice.

Mr. Dixon: If it is being offered for that pur-

pose, I object to it, your Honor. The witness was here this morning.

The Court: Sustained.

Mr. Strachan: I don't know whether the fact that the witness was here, or not, has anything to do with whether they can change their story four years later.

The Court: Counsel, I wonder how serious you are on [3347] some of these offers. What do you contend this means?

Mr. Strachan: Well, I contend, your Honor—

The Court: How would you explain this to a jury?

Mr. Strachan: I contend that all of these things add up to this: That the idea that this business failure of Winckler's was due to a refusal of fruit from Sunkist is definitely an afterthought and a rationalization, and the correspondence shows that various other explanations were given by the plaintiff corporation at the time the transaction occurred.

The Court: I will receive it in evidence. I will change my ruling. If you can make anything out of it, all right.

If you are going to read all this stuff to the jury, they really will be worn out.

Mr. Dixon: I would like to be heard on this so I understand what it is being offered on. Because to me, reading this in context, it is sales talk, and it doesn't say what the bookings are for.

If counsel is apparently going to try to argue that plaintiff had heavy bookings on unsweetened juice,

or any other product, at that time, and that was the reason he wasn't able to offer any price on it, it is obviously not supported by any evidence already in the record, which I think was available to the defendants, and, therefore, should be based upon that foundation. In other words, this [3348] document is ambiguous on its face, as far as interpreting it is concerned.

The Court: I hate to be wishy-washy, but I am going to plop back on the other side. Here is a man who was sales manager, he wasn't even an officer of this corporation, and I take it that you are going to argue that this is an admission of some kind that actually they couldn't sell unsweetened juice because of—whatever heavy bookings are, and therefore it wasn't because they didn't have it to sell.

On the whole face of the record the thing is absurd.

Then you have the problem of what is meant by "bookings," and the question of one side or the other explaining this exhibit could well take up a half hour before you got through with it.

Certainly the administration of justice doesn't require the alleged admission by a sales manager, who came in a short time before, as proof of a case. If you haven't anything better than that——

Mr. Strachan: It seems to me that what Mr. Dixon has said that has persuaded your Honor has to do with the weight, rather than materiality and relevancy.

The Court: It isn't what he said.

As I sat here and I ruled one way, and then the

other, then I read the thing over and see how ambiguous it is, and I hear you arguing this way, and then the other fellow replying [3349] to what it means, I can envisage a further delay of the trial over one little telegram by a sales manager.

Mr. Strachan: I can assure you that it won't lengthen, the trial 30 seconds, your Honor, if you admit it.

The Court: Objection sustained.

DW.

Mr. Strachan: That is offered to show the disposition of the inventory at distressed prices.

Mr. Dixon: Objected to, your Honor, on the ground that this document was signed or allegedly signed by the witness who was before the Court this morning.

I think if there was anything of that kind that counsel wished to use, he should have used it at that time when he had the oral testimony here and we had the right of cross-examination.

The Court: Isn't this all cumulative? Didn't the witness testify to that?

Mr. Dixon: It is cumulative, in any event, in my judgment, but they are offering it, and I am objecting to it on the grounds stated.

The Court: Objection sustained to DW.

DX.

Mr. Strachan: That is offered because it constitutes an admission that the supply of oranges for single-strength juice in September of 1951 was very low, and also for the [3350] prices quoted as of that date for the sale of that juice.

Mr. Dixon: I object to it, your Honor, on the ground that the witness, Mr. O'Hanlon, who apparently signed this document, was available here in Court this morning for direct examination of anything contained herein that counsel might wish to have used it for. Therefore, it is not the best evidence, and the plaintiff objects to it on the ground that if anything contained therein is to be used in any manner, it should have been brought out on direct examination by the defendants this morning so that the plaintiff would have the right of cross-examination.

Mr. Strachan: I don't think that we have the exclusive alternative of showing by testimony, rather than by letter. I think either one might be proper.

The Court: Don't you have prices shown in the record already?

Mr. Strachan: For certain periods. I don't think there is anything for this particular period.

The Court: You have an Anagram coming up here, EA.

Objection sustained.

DY.

Mr. Strachan: Your Honor, I dislike seeming to argue after ruling——

The Court: That is all right.

Mr. Strachan (Continuing): ——but I do want to say that [3351] I think the evidence is uncontradicted that on the date of this letter the supply of oranges for single-strength juice was extremely limited. There was practically none available.

The Court: You say the evidence is uncontradicted on that?

Mr. Strachan: I rather think that is the fact.

The Court: Then it is only cumulative.

Mr. Strachan: I know, but here we have an admission from the other side.

Mr. Dixon: He is not an officer of the plaintiff corporation.

Mr. Strachan: Do you mean that the assistant sales manager of the plaintiff corporation was not a man whose word could be relied on? That seems to be the position taken.

Mr. Dixon: Don't be absurd, counsel. I said he was not an officer of this corporation.

The Court: It is getting late and we are tired, and I have sustained the objection.

DY.

Mr. Dixon: What purpose is this offered for?

Mr. Strachan: This is a report——

The Court: It is offered for the truth of the facts contained there, I suppose.

Mr. Strachan: ——as to the market prices that the [3352] Parrot Company reported had been quoted by Silzle and Case-Swayne in the San Francisco market.

The Court: Objection?

Mr. Dixon: Yes, your Honor.

The Court: Sustained.

DZ.

Mr. Dixon: I don't think I have any objection to this, your Honor.

Mr. Strachan: I will withdraw the offer of DZ.

The Court: You can't get it in, Mr. Dixon, if he doesn't offer it.

DZ withdrawn.

Mr. Dixon: I said I had no objection before he said he wished to withdraw it.

The Court: I am not going to calculate the time element. I am trying to keep down the number of exhibits. If I can find any ground to sustain the objection of either one of you I am going to do it.

Mr. Dixon: As far as I am concerned, they can all stay out.

The Court: EA.

Mr. Strachan: I am offering that to show the prices quoted, as well as for the text of the Anagram.

The Court: EA received in evidence.

I didn't hear your objection, but I will assume it is [3353] the same.

Received in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit EA.)

The Court: EB.

Mr. Strachan: I am offering that to show the fact that the plaintiff company was commencing to quote on frozen orange concentrate and did quote prices as of that date, to show the prices quoted.

The Court: What is the materiality of that? To show that they were going into the concentrate business?

Mr. Strachan: "We are just starting out in the frozen concentrate field."

They started that in September of '51.

Mr. Dixon: That isn't the best evidence, counsel, of that fact.

Mr. Strachan: Well, it is plenty good evidence, I think.

I don't think there is any best evidence rule applicable against this.

Mr. Dixon: Even though the person that signs the document was in Court this morning and you could have asked him the question?

I object to it on the ground stated, your Honor.

The Court: Didn't he testify to this this morning? [3354]

Mr. Strachan: No, sir.

Mr. Dixon: He testified to some things, that they went into the frozen juice business, yes.

Mr. Strachan: He said when he was employed Winckler told him that he was going to go into the business.

The Court: Overruled. EB received in evidence.

The Clerk: EB in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EB.)

The Court: EC.

Mr. Strachan: I am offering this for the Market News statement that the shortage of Valencias is increasing because of the fact that available fruit is going into the more profitable frozen concentrate than into the unprofitable single-strength juice, and as a consequence they have had to withdraw prices on the canned orange juice.

Mr. Dixon: I don't know how much of this stuff is going to go into the record in this case. It is capable of two interpretations.

The Court: Objection overruled. EC in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EC.)

The Court: ED.

How many more do we have here?

Mr. Dixon: We are just starting, your [3355] Honor.

Mr. Strachan: I am offering that for the admissions contained therein as to the occasion for the shortage of fruit in the fall of 1951.

Mr. Dixon: Your Honor, I certainly object to it again, on the ground that the person who allegedly signed this document was here in Court this morning, and certainly now is no time to try to put in as proof of the fact contained in this letter anything which was available to the defendants by direct examination when this witness was here this morning. And I have no right of cross-examination to go into this question at this time.

The Court: I am not going to go any further tonight. I am getting tired and so are you.

Mr. Dixon: We are not bound by these sales managers' statements.

The Court: This is an odd situation. I am trying to reason it out. Here is a man who was assistant sales manager, not an officer or director. He demonstrated on the witness stand this morning that he knew something about sales, but I don't think he demonstrated any great knowledge of matters other than that. You had him on the stand,

and now you offer these as admissions against the company. Of course, the strict rules of admissions against interest, if it is an admission on some issue, might make them admissible. I would like to have you both look it over and think about it. [3356]

I might go back and change some of my decisions on these letters. [3357]

* * *

January 31, 1956, 9:00 A.M.

* * *

The Court: Let the record show the jury absent.

The Clerk: Counsel handed me a motion by the defendants for leave to amend their answers, and the plaintiff has handed me a motion for leave to amend the complaint. [3365]

* * *

The Court: We will consider the motion of the defendants. With the showing made by the motion as being defendants' argument to start with, let me hear from you briefly, Mr. Dixon, as to why this motion should not be granted.

Mr. Dixon: May it please the Court, this is a motion to amend the answers to the amended complaint which comes at a time when we are practically through the trial of this case and in which the defendants are endeavoring to set up a so-called affirmative defense to the action of the plaintiff. We submit that this defense, if it be a defense, was waived [3366] by the defendants not affirmatively

stating it as required by the rules at the time the answer was filed to the amended complaint.

That this is a complete afterthought on the part of the defendants when they found that under the state of the pleadings, which determines the issues in this case, they were unable to inject into the case this wholly collateral issue of the question as to whether or not the products of the plaintiff complied with the requirements of the Food and Drug Act of the Federal Government. [3367]

Again, I would say that such an issue, if it were properly raised at the proper time, would be one which would not have any relevancy or bearing on the issues in this case.

Counsel suggested in their first effort to inject this into the case by amending the pleadings a short time ago, that they felt it was a question of law, and apparently now they have changed their position again with respect to that.

But on either basis, if as a question of law, it should have been determined prior to the start of the trial in this case, because if the contention that they then made was correct, that it would be dispositive of the issue and of this case, then we have been spending about six or eight weeks of time before the Court which has been utterly wasted.

As to the question of fact, we submit that that is not an issue in this case. It could not be raised even if properly alleged in the answer of the defendant. Because the question of whether this product or the products, which the plaintiff processed and sold in commerce, complied with the Federal

Food and Drug Act is not a material or relevant issue in this case. And if it were one we would be forced to defend that action, and obviously we would be trying an issue here which has no place in an antitrust lawsuit.

I think, therefore, your Honor, that the motion submitted by the defendants should be denied.

Mr. Strachan: May it please the Court, your Honor has [3368] read the motion and the proposed amendment to the answer. The motion proceeds, as does the proposed answer, not on the theory which Mr. Dixon has mentioned, that of an affirmative defense, but rather proceeds upon the theory that one of the issues of law, one of the controlling issues of law in this case depends upon the fact as to whether or not there was adulteration of the plaintiff's product.

If that adulteration be established as a matter of fact, it is our position that as a matter of law plaintiff has no right to recover.

The motion also proceeds on the theory, which is set out therein, that the pleadings, the evidence, all of the pretrial discovery proceedings, indicated to the plaintiff, and was understood by the plaintiff and its counsel, that there was an issue as to whether the product was adulterated or not.

Otherwise, why call for the laboratory records, why was the call for the laboratory records resisted? Obviously because it all bore upon the purity, the integrity of the Winckler-Smith product.

Their allegations in the complaint, which are in substance that Winckler-Smith was and had a rep-

utation for being a packer of quality, high quality citrus products—those allegations are denied.

Mr. Winckler testified that his products were of high quality. In his opinion they exceeded the minimum standard [3369] established by the Federal Government.

On cross-examination Mr. Winckler was asked about the quality of his product and he stated, further, that it was a first class product, probably higher quality than many of the others. It certainly exceeded the standards of the department.

He was asked whether it was permissible in packing citrus fruit juice to add tap water. He said no. [3370]

He was asked further whether he knew of any way by which acidity of the juice could be reduced to bring it within the minimum standards prescribed by the government. He said he knew of no way.

Had Mr. Winckler been honest, he would have answered those questions directly to the opposite and would have admitted that his product was a spurious product, that he knew how to reduce the acidity and he did reduce the acidity by adding water and other adulterants. That would have ended the lawsuit at that point.

But he was not forthright. He didn't testify to the fact, and the laboratory records which we produced here and the testimony of Miss Comstock and the others that have been offered on that subject would have presented inrrebuttable proof that the product was watered, as it in fact was.

As a matter of fact, it was so well known to everybody in the plant that there was a standing joke among the plant workers to the effect that if you gave Mr. Winckler an orange and a rowboat and a pair of oars and put him in Lake Mead, he would turn the lake into orange juice.

I say he was a notorious violator of the law. He has no standing in this Court, and we should be allowed to prove our side of the issues which were made by the pleadings, we contend, which were tendered by the proof, which were known from the date of the pretrial discovery, and we have [3371] presented this amendment only to point up and to avoid a mere technical objection to our evidence on a very substantial issue, evidence which, if we are precluded from putting it in, will have an extremely prejudicial effect on the defense of this case.

I might add that in any event the doctrine of unclean hands is a legal theory and need not be pleaded and is fully applicable here.

Mr. Dixon: If the Court please, before we close on this point, I think your Honor is aware of the decision in the Keifer, Steward v. Seagram, 340 U.S. 211, which completely disposes of the legal argument just made by counsel with reference to so-called unclean hands by a plaintiff in an antitrust suit.

The Court: Yes. I am familiar with the case. In fact, it was a different kind of unclean hands, but it was the same kind of doctrine.

The motion of the defendants is denied for the following reasons, among others:

First, as to discovery, what goes on in discovery is not determinative of the issues of the case. Discovery proceeds upon the theory that information may be obtained which may lead to other evidence, and I know of no rule that what happens in discovery demarks the issues of a case.

Secondly, we took part of a day here in particular [3372] going over issues, demarking the issues in this case. This issue was never raised or never tendered and never discussed by the defendants. Therefore, the Court concludes that the defendants did not have the issue in mind at that time or, if they did have the issue in mind at that time, they deliberately kept it from the Court.

Three, the application comes too late. At this stage of the proceedings, it would open a vista of affirmative evidence and rebuttal evidence that would take as long as this case has already taken to try. It is an example again, in my opinion, of the defendants trying to inject into this case every possible collateral issue, instead of talking about the essential elements of this case.

Here is the absurdity of the matter. The plaintiff's contention is that they couldn't buy oranges and make orange juice and sell it in 1951. The defendants have defended upon the ground that in other years they diluted their orange juice, that they—I don't know how far back the defendants would go, I could look at these records, but from what I have heard, there has been an offer here of matters in 1947, 1948, 1949 and 1950, all of which boils down to this: That the defendants say, "Well,

if the plaintiffs did make orange juice in 1951, they would have diluted it in 1951."

That certainly is extremely speculative. The law presumes that conduct is legal, and if you are going to engage [3373] in any presumptions of what would have been done, it is not the presumption that the plaintiff would have done in 1951 what he might have done in some prior year. You have a presumption that a thing once shown to exist continues, but that presumption refers to some physical fact that is shown and not to some course of conduct. If there is any conflict between the presumptions, certainly the presumption that a person would conduct himself lawfully controls over the other.

So we have, therefore, this speculative proposition that if the plaintiff had gotten oranges and if he had made orange juice, he would have put water in it.

The records in this case put into evidence and viewed in the light most fair to the defendants show that in 1949 and 1950, there was an operating profit made. By operating profit, I mean the profit based upon activities of the company before there were included into the statements other matters which defendants claim should have been considered as a loss. [3374]

For instance, in 1949 the operating statement, as such, shows a profit. The main controversy between plaintiff and defendant is whether $170,000 should have been thrown into the loss column. That $170,000, plaintiff argues, was properly attributable to

eorganization; defendants argue that it should have one in to the profit and loss statement for the year 9.

I think that is the major controversy between the arties on that year.

Now, that $170,000, in any event, from a practical andpoint, whether or not it belonged in the final perating statement of profit and loss, did not affect he fact that the plaintiff made citrus products, including orange juice, and sold them at a profit.

The year 1950 is a similar situation. Plaintiffs laim they show an operating profit; defendants, by djustment, say they do not. Their adjustments concern the matter of judgment as to whether an item hould be carried over in one year or two. There is o attack made upon the veracity of the books, hemselves, showing sales and so forth.

So you then have a situation where involved in his case is what happened in '51, not what happened in these other years, except insofar as they ight show what would be background material that d to the economic or financial position of the company in '51. [3375]

Now, the defendants would attempt to show what ppened in prior years as a basis of an inference what plaintiffs would do in the year in question.

There is no dispute that they didn't make orange ice, except for the possibility of samples; I see no roof by the defendants that they made orange juice at year.

I think, therefore, it injects speculative matters d matters not strictly within the issues of the

case. It would tend to confuse the issues. It has not been pleaded. It was not called to the attention of the court as an issue in the case.

What went on in discovery has no bearing on what might ultimately be the issues in the case.

Mr. Strachan: May I have just a word, your Honor?

The Court: Yes.

Mr. Strachan: As to the suggestion that evidence as to what would have been done in 1951 is speculative, I have this to say: that the laboratory records show in the year 1951, when Valencia oranges were being processed into single-strength juice for Silzle company, and being processed into frozen concentrate for Morgan Ward—no. When the Winckler & Smith company in 1951 was processing single-strength juice under contract with Silzle, that juice was watered. And I think the evidence would show, and we would offer further evidence to show, that because of the nature of the Citromat [3376] machine, which was being used, there was no way of producing a profitable yield in single-strength juice from the Citromat process, and that of necessity water would have to be added both to get a satisfactory juice yield and to get a palatable product.

As to the discussion of issues preceding trial, I wasn't present, but I was given to understand that the fact was that there was a request during those discussions or a suggestion that it be stipulated that the Winckler-Smith product was comparable to other manufacturers of citrus product, and that the suggestion was refused. That certainly was brought

to the court's attention and we felt indicated that the matter was in issue.

Furthermore, our purpose is not only to show that in the ordinary course of business the production would have been adulterated in 1951, but also to show that in the prior years 1949 and 1950 there was adulteration of product; that that adulteration was responsible for the damages, and it was that, and other conduct on the part of the plaintiff's business, that was responsible for the failure and responsible for the damage, rather than any alleged unlawful conduct on the part of the defendants.

The Court: My ruling stands.

As far as other products, we are not concerned, certainly, with the quality of other products in this case, and any contention you make that the showing you have made has [3377] foundation in this record and would support that losses occurred in '49 and '50 because of the product, I think falls completely on the record. Plaintiffs claim that they made a profit in those years, and your showing concerns itself largely with the adjustment of various items. There has been no showing that would tie in with any now claimed showing of inferiority in these other products.

As to your contention that you would show that the juice was watered when made for Silzle, again, it seems to me, the same principle applies: you are speculating as to what would have been the situation thereafter, and you run up against the presumption that things are done legally, and how you can ask a

jury to make an inference of what a man would have done seems to me entirely speculative.

It was not raised as an issue. And the intimation, if it exists, that you say occurred, certainly didn't advise the court or counsel of the tendering of the issue.

Mr. Strachan: One other matter on which it bears, your Honor, and I don't want to leave the subject without having expressly mentioned it, and that is the fact that the practice of the Winckler & Smith company was to make an adulterated product is a circumstance and would explain why the defendants did not give Winckler-Smith the sort of a contract that they gave TreeSweet, even if it needed their services, and would explain to the jury why that was refused and not allow the [3378] jury to speculate on other causes from the plaintiffs' evidence that Winkler, on his own story, was making products that were comparable to TreeSweet and Sunkist. [3379]

The Court: This is your last suggestion now!

Mr. Strachan: I think so.

The Court: Well, you heard from all the witnesses so far and no official of Sunkist or EOP has so testified. There is a complete lack of foundation that this was knowledge in the official family of Sunkist or EOP at the time the alleged refusal was made.

I think Mr. Finley is going to testify further, but I don't anticipate nor do you offer that he is going to testify to his knowledge of this adulteration. Certainly without that discovery, there would not be any

justification of the refusal to make the fruit available. [3380]

* * *

The Court: EC went into evidence and ED is the next one in order.

Mr. Strachan: That's right, your Honor. I offer that on two bases. One is that it shows that in October of 1951, they were offering to sell orange juice, and the other is that it constitutes an admission that the fruit supply is short and the shortage was caused by the government school lunch program.

Mr. Dixon: We object, your Honor, if you are ready to have an objection now.

The Court: Yes.

Mr. Dixon: This again is a letter from Mr. O'Hanlon, assistant sales manager of the plaintiff, and not binding on the plaintiff, but it is obviously a sales letter endeavoring to excuse the inability to a customer, a broker of the plaintiff, [3382] to make single-strength juice available to him. It wouldn't be expected that they would admit the factual situation. The letter itself is not in accord with the evidence already before the court, that in 1951 there was a greater supply of oranges available, Valencia oranges, than in any previous year I mean that is already in the record, and while this may be regarded as some kind of an admission, it seems to me it is just further cluttering up the record and would require us to make that explanation, perhaps

Mr. Strachan: Well, the record doesn't show what Mr. Dixon says as to the availability of oranges. It shows there was a very large crop of

oranges, but it also shows that the demand for oranges in frozen concentrate form was extraordinary, and that combined with the school lunch program had made the abundant supply—accounted for most of the abundant supply and left little, if any, for single-strength juice.

The Court: Technically, it is my opinion it is admissible. If you want to put the jury asleep reading all these letters, you may do so. ED in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit ED.)

The Court: Now, we have EE.

Mr. Dixon: I have no objection to that. If we are going to have these in, that certainly should go in. [3383]

The Court: I take it you are offering it, are you?

Mr. Strachan: Yes, sir.

The Court: EE in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EE.)

Mr. Strachan: EF is offered to show an admission that the Winckler-Smith Company got a late start in the frozen concentrate business.

Mr. Dixon: I have no objection.

The Court: EF in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EF.)

The Court: Is EG offered?

Mr. Strachan: Yes, sir.

Mr. Dixon: I have no objection, your Honor. If

this type of thing is to go in, we might put them all in.

The Court: Do you offer EG?

Mr. Strachan: Yes, sir.

The Court: EG received in evidence.

(The exhibit referred to was received in evidence and marked Defendants' Exhibit EG.)

The Court: Is EH offered?

Mr. Strachan: Yes, sir, principally for the contents of the second paragraph.

Mr. Dixon: What is it being offered for, counsel? The [3384] truth of the statement contained therein?

Mr. Strachan: It is an admission by Mr. Winckler as the president of the company that the single-strength juice business in California was poor because of low prices in Florida which made it impossible for California packers to compete.

The Court: "In markets far away from the home."

Mr. Dixon: Yes.

The Court: Objection to it?

Mr. Dixon: Yes, there is, your Honor.

The Court: On the same grounds heretofore stated?

Mr. Dixon: Correct.

The Court: Overruled. In evidence, EH.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit EH.)

The Court: Is EI offered?

Mr. Strachan: EI is offered, yes, your Honor.

The Court: For what purpose?

Mr. Strachan: Primarily the second paragraph in the portion addressed to "our brokers."

Mr. Dixon: Well, your Honor, if this is the type of thing that is to go in, I presume it should go in.

The Court: EI received in evidence. If that is an objection, it is overruled.

(The exhibit referred to was received in evidence and marked as Defendants' [3385] Exhibit EI.)

The Court: Is EJ offered?

Mr. Strachan: Yes, sir. That is a different series, isn't it?

Mr. Dixon: This starts a new series, your Honor. I want to register a general objection to all of these exhibits which apparently run from EJ through to——

The Court: EW.

Mr. Dixon: Yes. On the ground that the person who purports to be making these reports, namely, the one referred to in most of them, is the manager, who is clearly available to give this testimony, if it has any relevancy to any issue in this case, by word of mouth rather than by this type of documentary form of evidence, so that the witness would be available for cross-examination. This is another effort to get some things in through the back door and to the jury which they couldn't get, possibly, by putting the witness who made these statements to the excu-

tive committees of the Exchange Orange and of Sunkist, and so forth, before the jury.

In other words, the objection is on the ground it is not the best evidence, cannot be offered for the truth of the statements contained therein, that to receive it in evidence would be to deprive the plaintiff of an opportunity to cross-examine any of the statements here that may be relevant to any of the issues of this lawsuit. [3386]

It is objected to on the further ground that many of the statements contained herein are irrelevant and immaterial to any of the issues of the lawsuit here, and would not tend to prove or disprove any such issues, even if admissible. But our primary objection is on the ground previously stated.

The Court: Are these all purported statements? I see one here that is a resolution. Do you distinguish between actions and a recitation of somebody's statement at the meeting?

Mr. Strachan: No. These are offered on the theory that they record the business transactions as they occurred in the ordinary course of business, reflected in the regularly kept minutes.

The Court: Business entries?

Mr. Strachan: I said these are a record of the business regularly conducted at these meetings and regularly recorded in the minutes.

The Court: I would agree that action taken by a corporation as shown by the minutes would seem to me would be proper, but it would seem to me that where somebody got up and made a speech and made

some statements, that that is not action taken by the company.

Suppose you had something better than minutes. Here you have some secretary's recording of what she thinks somebody said. Supposing you had had a stenographic report of what [3387] Mr. Armstrong said at a meeting, to point this problem up, and you offered the stenographic report of what Mr. Armstrong said at the meeting, do you think that would be admissible?

Mr. Strachan: If it was a record that was regularly kept, if it was the practice to keep stenographic records of the reports made by the officers to the executive committee or the directors, I think what was reported is certainly admissible.

The Court: I don't agree.

I think if any of these concern action taken, policies established, something that was the business activities of the company, as distinguished from somebody's report or speech or remarks, that is one thing.

Now, we have the basis of the offer and we have the basis of the objection; is that right?

Mr. Dixon: Yes, your Honor.

I could elaborate further on my objection. I don't think it is necessary to do so. Because to me, at least, it is so obvious that this type of thing is self-serving, it is not corporate action.

The Court: I don't know. Self-serving. We talked about that before. That leaves me kind of cold.

This happened before this suit.

It seems to me it hinges on the question whether this was action taken by the organization or whether it is just [3388] talk.

Mr. Dixon: That is my primary objection to it, your Honor, that if it is being offered for the truth of the statements contained therein, then I don't see how under any rule of evidence it is possibly competent.

The Court: You are offering it for the truth of the statements contained therein?

Mr. Strachan: No.

The Court: Then what other purpose would it have?

Mr. Strachan: I am offering it for the purpose of showing what was brought before the board and the executive committee at various times, which was responsible for their policy determinations; what was reported to them.

Mr. Dixon: How does it relate to the plaintiff in this case, counsel, will you kindly inform me? I am perhaps pretty stupid.

The Court: Now, wait.

If you have a specific action of a board that is in question, then some specific offer of what preceded that action may be proper. But this, so far, is offered generally to supposedly explain corporate action, and that is too general an offer.

Mr. Strachan: If you want me to point out particularly what portions I have in mind, your Honor, it will save you some reading. [3389]

Mr. Dixon: These are offered, I take it, in toto, counsel?

Mr. Strachan: Yes, I am offering these excerpts.

Mr. Dixon: Then they stand on that basis.

The Court: Let me look at them.

Mr. Dixon: It isn't a resolution that you are offering.

The Court: Each one of these has some resolution in it? No, not all of them.

As to EJ, the objection will be overruled. It will be received in evidence. However, the jury will be instructed that the document was not received in evidence for the truth of the facts recited by the person purportedly speaking to the committee. It will be received in evidence showing the corporate action, and that the jury might consider the matters purportedly stated by the person, not as any truth of the facts contained therein, but only of assistance to know what was reported to the committee when it took its action.

I would not permit you to argue to the jury the truth of the facts contained in the recitations.

Do we understand each other on it?

Mr. Strachan: I believe so, your Honor.

The Clerk: Defendants' Exhibit EJ received in evidence.

(The exhibit referred to was marked Defendants' Exhibit EJ and received in evidence.)

The Court: Now, EK.

EK received in evidence with the same limitations. [3390]

(The exhibit referred to was marked Defendants' Exhibit EK and received in evidence.)

The Court: Objection sustained to EL. It is entirely a recitation.

EM. EM received in evidence subject to the same limitations as EJ and EK.

(The exhibit referred to was marked Defendants' Exhibit EM and received in evidence.)

Mr. Strachan: EN, I don't think I will offer, your Honor. I will withdraw that.

The Court: EN withdrawn.

Mr. Strachan: I will also withdraw EO.

The Court: EO withdrawn.

I take it you are offering all these unless you tell me they are withdrawn?

Mr. Strachan: That is right.

The Court: EP received in evidence subject to the same limitations as EJ, EK and EM. It is action by the board. The recommendations and things stated may be considered by the jury in determining what the board had before it when it took action, but not for the truth of anything therein contained.

The Clerk: Defendants' EP received in evidence.

(The exhibit referred to was marked Defendants' Exhibit EP and received in [3391] evidence.)

The Court: EQ. Objection sustained.

ER. Objection sustained.

ES. Objection sustained.

Mr. Dixon: I don't know as I have any objection to that, your Honor.

The Court: I have been assuming that you were objecting.

Mr. Dixon: Yes. Well, I made the general objection.

The Court: You don't object to ES? Well, maybe they don't offer it. This it not a game now. Either we offer it and, if it is offered, there is or is not an objection.

Mr. Strachan: Yes, I offer it.

Mr. Dixon: No objection.

Mr. Strachan: I do think if it is received without objection, comparable minutes which have been excluded which bear on the same subject——

The Court: That is a matter of consistency of counsel and not the consistency of the court in its rulings. You have a right to object or not object to tendered evidence.

ES received in evidence.

The Clerk: Defendants' Exhibit ES received in evidence.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit ES.)

The Court: Since there is no objection, the order I made sustaining the objection which I thought was made will be set aside. [3392]

Mr. Strachan: What did you say, your Honor?

The Court: The order I made previously sustaining an objection, what I thought was an objection, will be set aside.

Is ET offered?

Mr. Dixon: Objection.

The Court: Sustained.

EU?

Mr. Strachan: May it please the court, in the second paragraph, fourth line, near the right-hand side end of that line, there is a figure 17,000, which is a typographical error, and should be corrected to read 11,700.

Mr. Dixon: I object to this.

Mr. Strachan: May I amend it on its face?

The Court: Yes, you may amend it on its face. It is offered and there is objection. Let me read it. The middle of the paragraph, "There is some question whether Sunkist specifications can be met in all outside plants, the manager said, and this is being checked closely through continuous inspection."

It is offered and there is objection?

Mr. Dixon: Yes.

The Court: Objection sustained.

EV?

Mr. Dixon: Objection, your Honor.

The Court: Objection sustained. [3393]

EW?

Mr. Dixon: Objection.

The Court: Objection sustained.

EX?

Mr. Strachan: Those are taken from the books and records of the Sunkist organization.

Mr. Dixon: To what period do these apply, counsel? You have just got 1951. I assume that is the whole year.

Mr. Strachan: Yes, it is the year 1951.

Mr. Dixon: I don't know as it is particularly relevant. Some of these exhibits you put in by month and others you put in by years.

Mr. Strachan: This is by the year.

The Court: Foundation waived?

Mr. Dixon: Your Honor, this doesn't show what it was spent for. It is my understanding from the records of the company and the previous actions of Sunkist that there was an appropriation made of around a million dollars for advertising purposes. Now, what is regarded as advertising again is a pretty broad subject. There are such things as shelf allowances, radio, television, and so forth. Now, does this represent all types of items? That is my question, your Honor. Or have they selected certain things and said, "This we regard as being spent for advertising; this we regard as being spent for sales promotion; and this we regard [3394] as being allowance made to the buyer, such as a shelf allowance."

It is my understanding that the million dollars covered all of those items Here we find it comes up to $664,000. It isn't too material.

The Court: Well, let's find out.

Mr. Strachan: As I understand it, these are the actual expenditures for advertising, and this doesn't include promotional cost. This is just Sunkist advertising of all kinds.

The Court: What do you mean by advertising?

Mr. Dixon: Yes, that is the question.

The Court: Let's see if we can define advertising so there is no problem. What is included in the term advertising?

Mr. Dixon: We might disagree with counsel as to whether it was advertising or not. Will you spe-

cify, counsel, what items you are covering in these expenditures?

Mr. Williams: Counsel, you recall you asked for information on Sunkist advertising and it was supplied with a big sheet. It will show the 664,000. It gave a detailed breakdown.

That, as I understand it, is the advertising by Sunkist and does not include such items as, say, co-operative advertising through the dealer, where the dealer advertises in a newspaper and had an allowance for it. This is advertising [3395] by Sunkist.

The Court: Do you mean in periodicals and newspapers?

Mr. Williams: Yes.

The Court: Billboards?

Mr. Williams: Yes. It is the all-over advertising.

Mr. Dixon: I have no objection to the exhibit, your Honor, if advertising is defined in the exhibit so that the jury will know what this money was spent for, and what is not included herein that might also be said to go into sales promotion work, such as these shelf allowances and other items. If counsel will specify in detail what items they have included in these total amounts, I have no objection to the exhibit.

The Court: Can't you in two or three words say what it is, if by advertising you mean billboards, magazines, newspapers, periodicals?

Mr. Williams: I don't have the detail sheet, your Honor. Do you have the detail sheet, counsel?

Mr. Dixon: No, I don't. I have got enough trouble trying to keep these papers straight.

The Court: You must have a copy somewhere.

Mr. Williams: We have a copy somewhere. I don't have it in the court room.

The Court: Let's pass this one and you can check it. In other words, if there is a specification as to what it is, there will be no objection. [3396]

Mr. Dixon: What is meant by Advertising, your Honor? That is my only objection to it in its present form.

* * *

The Court: What is the next one?

Mr. Strachan: FD is a graph showing the weekly fruit receipts of Exchange Orange Products Company in tonnage.

The Court: Is that all fruit?

Mr. Strachan: This is just Valencia oranges.

The Court: Oranges for sale as oranges and product [3397] oranges, also?

Mr. Strachan: No. These are the tonnages delivered to Orange Products Company, which is—

The Court: All oranges, then, all Valencia oranges?

Mr. Strachan: To Orange Products, which are the products oranges and not the fresh fruit oranges, and not those that are sold as fruit oranges by Mr. Kelly.

The Court: Can it be stipulated that these are charts prepared from the records of EOP?

Mr. Strachan: Yes.

The Court: Any objection?

Mr. Dixon: We haven't had any chance to check

them, your Honor, but we are not going to question them, your Honor.

The Court: FD received in evidence.

(The exhibit referred to was marked Defendants' Exhibit FD and received in evidence.)

Mr. Strachan: Now, we come to FE, which is that group I earlier withdrew, and they are now set up to show the orange utilization by the Orange Products Company by years from 1947 through 1951.

That, again, is based upon the books and records of Orange Products Company.

Mr. Dixon: It includes the years from '47 to '51, doesn't it, counsel?

Mr. Strachan: Yes. [3398]

Isn't that what I said?

Mr. Dixon: I thought you said just the year '51.

The Court: What do you mean by the words grower participation?

Mr. Strachan: That will be explained by Finley, whose testimony will relate to this subject. And that term is used in Sunkist to designate the sort of arrangements that TreeSweet and Silzle had in '51, for example, and others had in other——

The Court: Isn't there grower participation in everything that EOP does?

Mr. Strachan: This is different in this respect, your Honor: When you have what they call these grower participation contracts, you are entering into a contract in which both the packer and the grower are going to have to await future market devlopments to find out what is going to be realized

for the product, so the growers and the processor, alike, are participating in the proceeds of the product and participate in the rise or the fall of the market.

Mr. Finley will explain the origin of those and what it is that the term designates.

Mr. Dixon: If the court please, I think this exhibit might not be objected to by the plaintiff if they would change the designation to "gravy train" instead of "Grower Participation."

The Court: Now, let's be serious. [3399]

Mr. Dixon: But, certainly, I don't think that any identification of that kind should be on an exhibit.

Mr. Strachan: The phrase is one that Mr. Armstrong used, and which is commonly used to designate this type of joint venture.

Mr. Dixon: I don't see how it could be said to be——

The Court: What is meant by "deferred payment"?

Mr. Strachan: Deferred payment is the arrangement under which, say, Mission Dry buys oranges, perhaps, to put into bottlers' bases, or something of that sort. They may buy them in July, process them into these bases, but then instead of paying for the oranges they put them in the warehouse——

The Court: And don't pay until they sell?

Mr. Strachan: That is right. It is a secured credit transaction in that they pay when they withdraw from warehouse and sell. But they pay on the basis of the price at the time the oranges are acquired by them.

The Court: Title was reserved in the oranges and in the product until such time as they are sold?

Mr. Strachan: Not under those arrangements, your Honor.

The Court: Security was on the basis of the warehousing?

Mr. Strachan: That is right.

The Court: I think in view of the fact that this case hinges around the Silzle and TreeSweet contracts, that the term Grower Participation either should be eliminated or [3400] should be thoroughly explained to the jury what is meant, and the jury instructed in some way in connection with it.

Mr. Strachan: We certainly have no desire to mislead on that, and I think that both Mr. Armstrong's testimony, which has already been given, and Mr. Finley's testimony, which will be given, will define precisely what is intended by the designation "grower participation"; why that phrase was properly applied to this sort of an arrangement.

Mr. Dixon: If the court please, we get here into something which seems to me can be very misleading, because these two contracts are, of course—that is, the TreeSweet and Silzle contracts in '51—are in a sense one of the bases of the plaintiffs' claim here. Now, they are admittedly of a different type than all the others.

The Court: I think the term should be struck off of it. TreeSweet and Silzle will speak for themselves, and the witnesses can describe what happens, refresh the jury's recollection.

You have no other objection to the exhibit?

Mr. Dixon: No, your Honor.

These figures don't all check out with ours, but I am not objecting to that.

Mr. Strachan: What are we going to call that?

Mr. Dixon: Just leave it blank is my suggestion.

The Court: You can leave it blank. The contracts speak [3401] for themselves, TreeSweet and Silzle. Or you can put some other material on it.

Mr. Strachan: It seems to me if we put a descriptive heading on all of these others, we show for EOP's account, we show what is deferred payment, we have shown what we have always regarded as a third category, which is Grower Participation.

The Court: It would be very logical to leave it blank, because that is one of the controversies in the case. Plaintiff puts one characterization on it and you put another. The jurors are entitled to take either one. Why should you submit an exhibit which puts your characterization on it?

Mr. Strachan: It happens that is what it is known as in the business.

Mr. Dixon: It couldn't possibly be, your Honor, because that exhibit from start to finish shows that the only company that ever had this so-called kind of a grower participation contract up until 1951 was TreeSweet. Now, how could it be known in the business? If the plaintiff had known about this contract, we would have been more specific in our demand that we have this so-called grower participation contract.

Mr. Strachan: You mean your demand of Morgan Ward?

Mr. Dixon: Of TreeSweet—of Sunkist and Exchange Orange.

The Court: Let's go ahead. The ruling will be the objection is sustained unless you eliminate the words "grower participation," in which event it will be received in evidence.

Mr. Strachan: I would like, if that modification of the exhibit is required, to eliminate the "for EOP account, for deferred payment," and just have a list there.

The Court: I don't follow you. [3403]

Mr. Strachan: It seems to me that we are going to give a wholly erroneous impression if we show that we had two designated classes of arrangements there, one for EOP account, the other for deferred payment, and then we had two special arrangements that are unclassified at the end, so I would rather take it all off.

The Court: When you call the witness, you would take the ones for EOP account and you would point out that these people were processing for EOP. Then when you took the deferred payment account, you would point out that these were the Hyland-Stanford, Mission Dry contracts, in which the money was paid to Sunkist when sold, but Sunkist was secured by the warehouse receipts.

There has been enough talk about Silzle and TreeSweet already.

Mr. Strachan: But they are grower participation type, and they include a type that was offered to other processors who are customers. They were offered to Case-Swayne.

The Court: Then you can strike out the line across all, if you want to. I think you make it more complicated, but that is up to you. If you want to take the entire line there——

Mr. Strachan: I would like to have us consider in that connection, your Honor, FF, which is a graphic representation of the facts that are shown on FE. It shows year by [3404] year the various sorts of arrangements that were made and the volume that was processed under those arrangements. There the charts were keyed to the same headings that are used on FE.

The Court: The ruling will be the same. The grower participation is your characterization and is an issue in the case. I don't think it is proper. If you want to use the term TreeSweet and Silzle, or if you can think of some other term that can in a few words describe it where you have a contract to process it, give an option to purchase with discounts, and reserve title to it, all right, but I don't think you are entitled to characterize it in the exhibit when that is one of the issues in the case. In fact, that is the big issue in the case.

Consider it further and talk about it later.

Mr. Strachan: That is what I would like to do.

Mr. Dixon: While we are on this, I have this further suggestion. It seems to me that the colors that they have used here, while the blue and the green may stand out, I mean they are very similar and it would be much more easy if they want to characterize it to put one or the other, Exchange or

this so-called grower participation group, in red, so they could be distinct.

The Court: I am not going to require that. The colors are distinct enough if a person isn't color blind, and it [3405] can be pointed out what the matter is. I take it that your representation, Mr. Strachan, is that these charts are built from the figures shown in FE.

Mr. Strachan: That is correct, your Honor.

The Court: Will you accept Mr. Strachan's representation on that, Mr. Dixon?

Mr. Dixon: If counsel so represents, I will accept it.

The Court: Other than what we have been discussing about the words "grower participation," you would have no objection?

Mr. Dixon: No, your Honor, I wouldn't.

The Court: Talk it over and let me know [3406] later.

* * *

Mr. Strachan: Your Honor, there was some discussion at our session on last Friday of Exhibit DF, which was a poor reproduction of an Anagram. I have here another print which may be more legible than the exhibit which was identified.

The Court: Much more legible. I can read it without my glasses.

Mr. Dixon: What is the exhibit we are talking about?

The Court: DF, the Anagram which was not readable. The white copy may be put in in place of DF and it may be received in evidence.

Mr. Dixon: May I have a copy of it, your Honor?

The Clerk: DF received in evidence. [3407]

* * *

The Court: The jury is absent.

The Motion to Amend to Conform to Proof. I will consider the motion as plaintiffs' showing. I will hear from the defendants.

Mr. Fisher: May the court please, first I want to call to the court's attention that this is labeled "Motion to Amend the Amended Complaint to Conform to the Evidence," and therefore should be predicated upon that ground.

The first one that he seeks is the addition of the words:

"Single-strength Valencia orange juice was the principal source of income and profit of the plaintiff and constituted approximately 80 per cent of the total citrus juice products processed and sold by the plaintiff during the years 1949 and 1950."

I believe there is no evidence that breaks down the principal source of income and profit. I think there was evidence to the effect that approximately 80 per cent of the total citrus juice products was processed and sold by the plaintiff during those two years, but as to whether that was the principal source of income and profit during those two years, I believe there is no evidence to break that down.

The Court: When you say "amendment to conform to proof," no one concedes that plaintiff has proved or has not proved the allegations by the fact

that the amendment is allowed. It is whether the plaintiff would be permitted to argue these [3409] matters if the amendment was permitted.

In other words, it is looking at the case most favorably from plaintiffs' standpoint. Or if it was to conform to proof from the defendants' standpoint, it would be looking at the case most favorably from the defendants' standpoint.

I think there is sufficient evidence for the plaintiff to make some argument on that. Whether it is a sound argument is another question.

On the amount of sales of the various products, you would have to do some computing where the profit came from, but it could be argued that because of the large amount of Valencia sales, that that was one of the sources of profit. [3410]

Mr. Fisher: Now, with reference to the total sales during the two years exceeding $3,000,000, I believe that is correct. Is it not, Mr. Williams, Winckler & Smith total sales in the two years exceeded $3,000,000?

Then the next statement:

"The single-strength Valencia orange juice processed by the plaintiff during said years was sold in interstate commerce in competition with single-strength Valencia juice processed and sold by the defendants, EOP and Sunkist, and co-conspirators TreeSweet and Silzle."

The sales, we have pointed out, were made by Sunkist uniformly and not by EOP. Hence, the word EOP should come out.

Mr. Dixon: If the court please, on that the

language is processed and sold by the defendants EOP and Sunkist. Certainly EOP processed it. It is true Sunkist sold it. But I don't know how else you can in simple language break it down, unless you want to say processed by EOP for sale by Sunkist and sold by Sunkist. That is the thought in mind. It is hard to distinguish.

The Court: All right. Let's go ahead.

Mr. Fisher: Throughout in this paragraph they have combined all citrus juice products stating that the total sales of the plaintiff of all citrus juice products exceeded [3411] $3,000,000, and in that they have combined not only single strength, and we have been reminded a number of times that this lawsuit relates to single-strength orange juice, and not to citrus products as a whole.

The Court: It would be permissible to make an argument or a comparison as to what part of the business was single-strength juice, would it not? That has been talked about. If they sold one can of single-strength juice, that would be a far different situation from if they had sold 400,000 or 500,000 dollars' worth of single-strength juice in comparison to their total sales.

What is your next point? Do you object to paragraph 2?

Mr. Fisher: Yes, we do, your Honor. That states that:

"In 1951 Sunkist and EOP controlled and accounted for approximately two-thirds of all of the product Valencia oranges available in California for processing into single-strength orange juice and

other citrus juice products. The product Valencia oranges which are not processed by defendant EOP into citrus juice products or by independent processors for the account of EOP are usually sold by Sunkist to independent processors."

Now, the evidence is counter to that, in that there is first a sale by the citrus distributing plant, and the [3412] products not sold are those which are processed by EOP.

The Court: The Citrus Distributing Plant is a part of Sunkist.

Mr. Fisher: It is a part of Sunkist.

The Court: And Sunkist fixes the price that it will sell product oranges for?

Mr. Fisher: Correct, it does.

The Court: Well, I don't see your point.

Mr. Fisher: The point is that it is the products which are not sold which are then processed by EOP, and this is stated in the reverse, "which are not processed by EOP are sold."

Then the next sentence says:

"In 1951 Sunkist determined the selling price for its product oranges after consulting independent processors who were potentital purchasers thereof, including TreeSweet and Silzle."

The reference there, I am sure, should be "consulting the customers of Sunkist," rather than characterizing them as independent processors.

The Court: That may be the trouble with my disagreement with you, Mr. Fisher, is these are still allegations in a complaint. These aren't findings. These are allegations of a complaint which plaintiff

thinks it can argue and thinks it has proved. [3413]

Now, you might argue that these men were customers and that the Sunkist officials consulted their customers. The plaintiff likewise could argue as alleged that the officials consulted independent processors who were potential purchasers.

These aren't findings. This is still the allegation of a complaint broadened out based upon what the plaintiff contends it has proved. Unless the plaintiff is far amiss on some contention, it seems to me that they ought to be granted. I don't know in a way what good it will do except that it is proper to amend a complaint to conform to what you think the proof is. They are not findings. [3414]

I am not putting any stamp of approval on these allegations, any more than I would the allegations of the complaint as it was before the amendment.

Mr. Fisher: The same phrase occurs.

Well, I believe there was no testimony concerning the consulting of Silzle

The Court: I think there was testimony.

Mr. Fisher: My recollection is that there was no testimony. I think Mr. Kelly said, among other things, that he did consult TreeSweet, but I recall no testimony to the effect that he consulted Silzle.

Mr. Dixon: I will be glad to give your Honor the reference to it.

The Court: Do you have a reference to it?

Mr. Dixon: I think I can get it in just a moment. Page 323: "On single strength, I would ask the then customers, and as I remember them, they were Case & Swayne and Silzle and Mr. Finley."

And then the next question:

"Did you ever ask anyone at TreeSweet?

"And TreeSweet. I am sorry I overlooked that."

Mr. Fisher: I stand corrected.

The last sentence we particularly object to. The statement there is:

"The Sunkist selling price for Valencia [3415] oranges in 1951 also established the selling price for such Valencia oranges as were offered to independent processors by other suppliers."

That statement, I think, is just contrary to the evidence.

The Court: Mr. Fisher, a jury in deciding this case has a right to believe such witnesses as they want to. There were witnesses who appeared here that made that very statement, that the Sunkist price, in substance, established the price to processors.

There is also evidence that on other occasions fruit was sold at less than $40, and in some of those cases there was no reference to solid content.

Now, this doesn't seem to me to be out of line with what plaintiff could argue. The jury is entitled to believe one witness and disregard the rest. The jury could say as to those sales of less than $40, either there wasn't a solid content ratio, or maybe they were inferior oranges, we believe the witness who said the Sunkist selling price established the price for oranges.

I think Morgan Ward himself——

Mr. Fisher: No, he didn't say that it established the price. He said that his price followed generally. He did not say that it established the price.

The Court: Wouldn't that be a permissible inference for the jury, if he said that his price followed the Sunkist price, [3416] wouldn't it be a permissible inference, therefore, that the Sunkist price established his price?

Mr. Fisher: No, I think not. Because actually his prices were lower for the most part than the Sunkist prices.

The Court: Does that complete your showing on II?

Mr. Fisher: Yes.

The Court: Do you object to III?

Mr. Fisher: We will not object to III.

The Court: Do you object to IV?

Mr. Fisher: Yes. The objection there, and I would like to read that subparagraph:

"Plaintiff's existence as a juice canner depends and at all times herein mentioned was dependent upon the acquisition by it of large quantities of by-product fruit for processing into canned natural or frozen concentrate juice."

They propose to add after the word "juice" "at a price or on terms comparable to those at which Sunkist made Valencia oranges available to other independent processors for processing into citrus products, particularly single-strength Valencia juice."

As a matter of fact, that was in issue from the beginning, and the inclusion of the frozen concentrate, while originally in the complaint, in the matter of proof the lawsuit has been restricted to natural strength orange juice. [3417]

The Court: You are objecting that he is not tak-

ing something out of his complaint, you are objecting that he is leaving in the complaint the words "frozen concentrate juice"?

Mr. Fisher: If the amendment is to conform to the proof, I think it should be out.

The Court: I have your point.

What about V, do you object to V?

Mr. Fisher: I am not through with IV.

The Court: All right.

Mr. Fisher: In this, that there is no evidence in the case that he was dependent for his supplies on Sunkist.

In fact, the evidence is counter to that. He had been getting his supplies from Morgan Ward and not from Sunkist.

And when you tie this in with, "upon the acquisition by it of large quantities of by-product fruit at prices or terms comparable to those at which Sunkist made the Valencia oranges available to other processors," it is tantamount to an allegation that he was dependent upon us for the acquisition of by-product fruit, which the evidence shows the contrary. He had, in effect, turned his back upon Sunkist as a supplier and was getting his supplies in the years before 1951 from Morgan Ward. [3418]

Now, passing to V, we have not been able to check out the figures that are in this. The 5,400,000 gallons is, I believe, approximately correct. I think Exhibit 11 shows instead of the figure being approximately 3,400,000, that the evidence shows that it was 3,045,000 gallons.

Mr. Williams: Just about 44,000.

Mr. Dixon: Well, I might say at this time for the record, your Honor, that the computation is based upon figures that I thought represented what they apparently did in the record. I have, however, since Mr. Williams directed the change here in the stipulation, and so forth, to my attention, checked these figures, and the actual figure is 4,511,202 gallons, of which approximately 3,044,394 gallons were processed. I am perfectly agreeable to having those figures checked.

The Court: Let's have the figures again.

Mr. Dixon: 4,511,202 gallons, and then the next figure is 3,044,394 gallons.

The Court: All right. May the motion to amend be amended in that manner?

Mr. Fisher: Yes, though we object to the balance of it.

The Court: You still object, but the amendment may be made. The clerk will make the change in the record. Go ahead.

Mr. Fisher: Turning now to the last sentence, it says: [3419]

"Because of the monopoly control by Sunkist and EOP over the quantity and price at which Valencia product oranges were made available to independent processors of single-strength juice other than Tree-Sweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single-strength Valencia juice in 1951."

There isn't any evidence in the record showing that Sunkist and EOP had a monopoly control. In fact, the evidence is to the contrary, that fruit was

purchased by Swayne from other sources, fruit was purchased by TreeSweet from other sources. It can't be said that this would be to conform to the proof. Quite the contrary.

The Court: I think the plaintiff is entitled to argue that point, that there is sufficient showing from which a jury could find that there was a monopoly control, not over every orange, but over such a substantial part of the oranges that, coupled with the price set by Sunkist of $40, and coupled with the TreeSweet contracts, this argument would follow.

Mr. Fisher: I think at the most there was only 66⅔ per cent of the product oranges, of Valencia oranges, which was available to Sunkist or EOP, and it can't be said that that constitutes a monopoly control. I don't think the evidence [3420] will bear it out.

The Court: Well, what do you think would have to be shown? Is there any magic in figures? Isn't it a question of fact from all the evidence in the record?

Mr. Fisher: There are, of course, certain cases where as much as 90 per cent is said to amount to a monopoly control, but certainly not when there is only 66 per cent or two-thirds.

The Court: Of course, the law is, monopolize, attempt to monopolize, or attempt to exercise monopoly control.

I think we better adjourn and take up again at 1:30. It's 12:10 now.

Mr. Fisher: Could that be 2:00 o'clock, your

Honor. We have made other plans for the noon hour.

The Court: Well, we wasted a couple of hours. We will work tonight on instructions then.

Mr. Fisher: That is agreeable.

The Court: 2:00 o'clock. But we are going to keep on going on some of this instruction work. 2:00 o'clock.

(Thereupon, a recess was taken to 2:00 [3421] p.m.)

Tuesday, January 31, 1956—2:00 P.M.

(The following proceedings were had in the absence of the jury:)

Mr. Fisher: If the court please, I think before lunch we were down through paragraph V of Mr. Dixon's proposed amendments.

Now, we object to paragraph VI in which he proposed to add:

"Defendant EOP agreed with TreeSweet to make Valencia product oranges available to TreeSweet, a competitor of Sunkist and plaintiff in the interstate market for single-strength Valencia orange juice, under an arrangement or contract pursuant to which TreeSweet would not be required to purchase product Valencia oranges from Sunkist or any other source, for processing into single-strength Valencia orange juice."

There is nothing in the contract with reference to any requirement to purchase oranges. TreeSweet was privileged to buy elsewhere, and so far as the quantity was concerned the quantity to be supplied

to TreeSweet was in the discretion of the supplier. We see no reason, nor is there anything in the evidence that we can see which would justify the amendment of the complaint in the manner specified.

The contract, as a matter of fact, was submitted long [3422] prior to this trial. It had notice of the terms of the contract, and it was attached to our interrogatories way back in 1952.

There is no occasion that we see for the amendment.

As I say, under the terms of the contract, TreeSweet was privileged to buy oranges from any other source, and did.

I think they purchased something like a thousand tons or more from sources other than Sunkist. And the quantity to be furnished TreeSweet under the contract was in the discretion of the supplier. There were no requirements under the contract.

As to paragraph VII, we have no objection to the suggested change there.

As to paragraph VIII, where the proposed amendment is to insert:

"at the Sunkist published selling price for Sunkist single-strength Valencia orange juice, less certain discounts and allowances not available to other purchasers, including the plaintiff here."

The evidence is clear that discounts and allowances were allowed under the Silzle contract, and there is also evidence to the contract that Mr. Swayne was approached for a contract similar to the TreeSweet contract, and he elected not to take it.

Hence the evidence does not support the statement that it was not available to other purchasers. [3423]

The Court: It would be a question as to whether it would be all others or certain others.

Mr. Fisher: As it reads it would apparently be all others.

As to paragraph IX, the proposed additional matter is:

"and at the Sunkist published selling price for single-strength Valencia orange juice."

That relates to the statement:

"Substantially all the single-strength natural orange juice processed by TreeSweet and sold by it during the 1951 orange juice canning season was processed under said contract and was sold in competition to that processed and sold by plaintiff to the canned juice market."

Then they seek to add:

"and at the Sunkist published selling price for single-strength Valencia orange juice."

The evidence in this trial is to the effect that TreeSweet sold at varying prices from the Sunkist price, and not at the Sunkist published selling price for single-strength Valencia orange juice. [3424]

Turning now to paragraph X, where they seek to strike a portion of paragraph F appearing on page 13 of the amended complaint, so that that paragraph would read:

"As a direct and a proximate result of each of the above acts of the defendants and the monopoly

control of defendants Sunkist and EOP in 1951" and so forth.

Now, there again we contend that there is no evidence in the record of a monopoly control of Sunkist or of the defendants Sunkist and EOP in 1951, as to the amount and price of product Valencia oranges available for processing. I mentioned that point before in connection with other paragraphs.

Reading on:

"* * * for processing into single-strength Valencia orange juice by independent processors, all price competition between Sunkist, TreeSweet, and Silzle in the single-strength Valencia orange juice processed by them and sold in interstate commerce was eliminated; Sunkist determined, dominated and controlled the price at which such juice was offered for sale in interstate commerce by TreeSweet and Silzle * * *"

The evidence is that there was no requirement that TreeSweet and Silzle sell at the price for which they purchased. They were free to sell at such amounts as they desired, [3425] and there is further the evidence in the record that the price at which juice was offered for sale in interstate commerce was dominated and controlled by Florida. There is substantial evidence in the record to that effect.

Furthermore, the point of price fixing was never pleaded in either the first complaint or in the amended complaint, and were it to be introduced at this stage of the trial, certainly we should have a chance to combat it and there should be a continuance of the trial for that purpose.

Furthermore, the point of the statute of limitations which we have heretofore raised would be applicable to such a change in theory.

Reading on:

"* * * plaintiff was unable to process, can, and sell any single-strength Valencia juice in interstate commerce in competition with that sold by Sunkist, TreeSweet and Silzle; plaintiff in an effort to keep its customers for single-strength Valencia juice purchased from Sunkist for sale and delivery to one of its said customers approximately 1,400 cases of single-strength Valencia orange juice at a price substantially in excess of that at which TreeSweet was then purchasing single-strength juice from Sunkist under the contractual agreement [3426] hereinbefore referred to in specification III(d) herein;"

To begin with, that purchase relates to a purchase by Ralph's. That was a purchase by a single customer for the purpose of meeting the requirements of a single customer. The purchase was in intrastate commerce. It was not in interstate commerce at all.

Furthermore, it was an accommodation sale only and was on the same terms as would ordinarily be sold for an isolated sale to another canner. There was no difference in the amount of discounts which would have been given in connection with that sale than would have been given TreeSweet or any other canner had they purchased orange juice. It was on the same basis.

Then to continue:

"Plaintiff lost the profits on its anticipated single-strength Valencia juice business in 1951 and was

forced to file proceedings under Chapter 10 of the Bankruptcy Act on March 19, 1952."

In other words, they are injecting here the so-called Ralph's sale, not in the Robinson-Patman Act cause, but injecting it in the first cause of action, and certainly the matter of the Ralph's sale has been known for a long period of time. It is nothing where an amendment is required due to the evidence produced at the trial.

We think that paragraph X is particularly [3427] vicious for all of these reasons which we have pointed out.

Now, as to paragraph XI, we have no objection.

Paragraph XII we object to. Again this, if granted, would amount to a change in the theory of the plaintiff's lawsuit. There is no evidence that "and co-conspirators ELP, TreeSweet and Silzle have conspired to and in fact have monopolized." There is no evidence of that. It was not pleaded in the amended complaint. It certainly comes now too late for them to seek to change the theory of their lawsuit. The theory of that lawsuit was based on the theory that we had a lawful monopoly and here they are switching from that viewpoint. [3428]

As to XIII, we have no objection to XIII, nor to XIV.

As to XV, we certainly do object. In that paragraph there is an attempt to bring in the Hyland-Stanford and General Foods contracts and allege them as part of their claim for damages.

Your Honor, those contracts were introduced, and as I recall it they were offered—we did not object

to them, but they were offered on the understanding that they were simply being offered as background. Now, then, if they are to attempt to predicate, as they do here, the damages on that, then certainly it seems to me that the trial should be continued, because we should have an opportunity to combat that.

Furthermore, the Hyland-Stanford contract goes years back, and there would be the matter of the statute of limitations' point which we raised in connection with the Silzle contract.

But above all else, through this proposed amendment they are attempting to base their cause of action for damages on the two contracts which, when they were introduced in evidence, it was on the understanding that it was merely background.

The Court: Would you still object to XV if the plaintiff could not count upon those contracts as causes of action for damages, but merely argue their part in the picture as a whole? [3429]

Mr. Fisher: We anticipate that they would argue on the picture as a whole, we anticipated that. I think that was in connection with the background, but certainly they should not bring them into the complaint here as a part of their claim for damages.

The Court: Mr. Dixon, I want to hear from you on certain things here.

In paragraph X, are you pleading now——

Mr. Fisher: Your Honor, Mr. Fowle has a thought that perhaps should be expressed, if your Honor does not object.

The Court: All right.

Mr. Fowle: I simply thought, your Honor, in an-

swer to your last question, that even to permit plaintiff to argue this matter to the jury would be prejudicial.

This is an allegation with respect to transactions, which was not contained in the amended complaint. Really, in my view, it has nothing to do with the theory of the amended complaint. I don't believe there is, really, any evidence in the record, anyhow, that there was an exclusion of other marketing cooperative organizations, such as Independent Fruit Growers Association.

Mr. Ward didn't testify that there was any exclusion. He said he tried to do business with them, but wasn't able to.

All sorts of inferences could be drawn from that that are [3430] exactly as good as the inference that he was being excluded.

In any case, it seems to me that it would be prejudicial to argue this matter to the jury or to allow it to be argued.

The Court: You are talking now about XV?

Mr. Fowle: Yes, I am.

The Court: All right.

As to X, Mr. Dixon, are you for the first time raising the question in this complaint of price fixing?

Mr. Dixon: Not as a factor for which the plaintiff claims any damage, your Honor.

The Court: Wait a minute. By that you mean you are not listing it now as one of the specific things——

Mr. Dixon: No.

The Court: ——which like the six things already in the complaint you contend are the cause of your damage?

Mr. Dixon: Definitely not, your Honor.

The Court: Secondly, has it been referred to directly or indirectly in the amended complaint as it stands to date?

Mr. Dixon: Yes, I think it has basically, because the first cause of action to which this amendment relates charges that the defendants entered into contracts, among other things, which had the effect of restraining trade in interstate trade and commerce.

I might digress for a moment.

We have heard much in this case previous to the opening [3431] of the trial, and even during the trial on the motions to dismiss, as to the necessity for allegations in any private damage suit showing public injury. I think the complaint already stated sufficient allegations to show public injury to the extent that it may be required under the cases, but this allegation, your Honor, is another indication or another allegation, which I think is properly in the case, because as your Honor will note in the instructions which we have filed with the court, which we would request be added here, that this type of thing, if true—in other words, it is a question of fact—would be corroborative and supporting evidence of the existence here of the combination which the plaintiff charges violates the antitrust laws in the first cause of action, and which resulted in restraints of trade.

Now, that is all this allegation does, your Honor.

The plaintiff does not contend that it was damaged as a result of any arrangement of this kind, any more than it claims that it was damaged as a result of the Hyland-Stanford and General Foods contracts, but those contracts, as well as the effect of the contracts complained of in this case between TreeSweet and Exchange Orange and between Silzle and Exchange Orange had this effect.

That is all this allegation means.

Now, that is important, your Honor, in the case to the extent that it may be evidence of the existence of the combination [3432] charged to exist here by the plaintiff in this complaint. But it is not the basis of any claim of damage, obviously.

In other words, I did not know, frankly, until all the evidence was in in this case, and I had the benefit of Mr. McMillan's testimony, and of the testimony of the representative from Silzle—I had endeavored to get that information before, but was not successful in doing so until we elicited it here from the testimony of those two witnesses, that that is actually what happened in these contracts, your Honor. And I think the record is clear to that effect and that is why we are now asking that this allegation be added to the allegations made in the complaint, as evidence of the existence here of a combination which the plaintiff charges violates the antitrust laws.

I think in the instruction that we have submitted to your Honor you can see on this point when we get to it that there is no claim made that this type of thing, if a jury so finds, was necessarily—I mean

that it in and of itself damaged the plaintiff, that is not the claim.

The Court: I intend to see that the jury is instructed that plaintiff has the burden of first showing a violation of the antitrust laws;

Second, showing that its damage resulted from one or more of the six matters pleaded in the first and second cause; [3433]

And, thirdly, the exemption of the Bireley contract, and other similar contracts, from the complaint for damage.

Mr. Dixon: This is not an attempt to extend the issues of the lawsuit, your Honor. Rather, it is an active allegation which will limit the issues of the lawsuit insofar as the second cause of action is concerned, involving Section 2 of the Sherman Act.

Your Honor will note by reading the amended complaint, and the second cause of action, that not only the original complaint, but the amended complaint, as well, alleged two things with reference to violation of Section 2. Namely, that the defendants had combined and conspired to monopolize, and, second, that they had attempted to monopolize. [3434]

Now, either one of those allegations constitutes, separately stated, if proved, a violation of Section 2 of the Sherman Act.

Now, what has been done by this amendment is to take out of this case entirely any reference to the attempt part of Section 2 and to limit the issue under Section 2 or under the second cause of action entirely to the claim that there was a combination here to monopolize the citrus juice products proc-

essed in California and sold in interstate commerce by the things alleged in the first cause of action, I mean those facts and then any additional facts that are added here, such as Paragraph XV.

Now, Paragraph XV which we have suggested and requested be added here brings into focus the Hyland Stanford contracts and the General Foods contracts solely for the purpose of indicating the existence here on the part of the defendants of the conspiracy or combination to monopolize the citrus juice market. How? These contracts evidence that, your Honor. The plaintiff does not claim he suffered any damage from them. He couldn't. But certainly if they are in this case at all, they are admitted for the purpose of showing the existence of that alleged combination in violation of Section 2.

Now, these allegations in 15 clearly are supported by evidence already in the record, the testimony here of Mr. [3435] Ward and others, how he was restricted in the sale of his product, I mean of the oranges he had for sale to Hyland Stanford, I believe it was, after 1950, when this kind of contract that is already in evidence was entered into, which prevented them from purchasing oranges from Ward or from any other source except under very restricated conditions which, of course, never came into effect.

So that I just wanted to point out in passing that the purpose of all of these amendments, your Honor, to the complaint is to sharpen up and put in focus the issues in this case, and that I think is done more

clearly now that we know what the evidence in this case actually is, than I could certainly have hoped to have done at the time I filed the amended complaint.

There is no surprise here. There is no additional claim made by any of these amendments that the plaintiff suffered any damage by reason of anything that is asked to be added to the complaint here, but the allegations which we do ask be added to the complaint do in my opinion support the general allegations of the existence here of the combination to violate both Section 1 and Section 2 of the Sherman Act.

I might add further that in connection with this whole matter, the plaintiff will probably dismiss the third cause of action involving the Robinson-Patman Act before this case goes to the jury with the further purpose of focusing [3436] the issues in this case on what I regard as the basic complaint against the defendants as now alleged in the amended complaint, and as would be further, perhaps, clarified by the addition of the amendments that we request be added to the complaint at this time.

The Court: All right. The objections to the motion to amend are overruled. The motion to amend is allowed with the understanding that plaintiff will not be entitled to rely for damage upon any matters contained in these amendments, that the plaintiff is now limited to six items as alleged, and that these items are matters which go to enlarging the form or explaining the complaint or eliminating

some of the issues such as have been discussed by counsel.

With that understanding and ruling in mind, any question of statute of limitations is obviated in the matter.

Mr. Fisher: If the court please, we feel very strongly about this, particularly changing and bringing in the Hyland-Stanford and General Foods contracts.

The Court: This doesn't change a thing. When they were admitted, the jury were told that the plaintiff was not counting upon them, could not count upon them for damage, and they were introduced generally for other purposes in the case, and that is exactly what the situation is here. I would apprehend that the plaintiff could argue this matter even without this amendment. [3437]

Mr. Fisher: But, your Honor, this does inject into this case the matter of price fixing, which was not in, and we feel we should be accorded an opportunity to meet that, and the defendants will therefore move for a continuance of the trial, say for two weeks from next Tuesday, in which to meet it.

The Court: The complaint alleged on page 10 of the amended complaint, that the defendants, and so forth, combined, conspired with each other, and entered into contracts which had the purpose and effect of unreasonably restraining interstate trade and commerce and so forth.

Price fixing is nothing new to you gentlemen. I called your attention to it a long time ago. I can't

cite you the record, where, as I read the amendments, I think it was to the Silzle contract, they were open and shut price-fixing provisions, permission to sell certain juice in Arizona or somewhere else if it would be sold at a certain fixed price.

It can also be argued, although that amendment definitely in my opinion was price fixing, the amendment to the contract, it could also be argued that since TreeSweet and Silzle bought the juice from Sunkist based upon a formula that involved Sunkist prices, that inferentially there was price fixing of the juice to TreeSweet and Silzle. Certainly TreeSweet and Silzle wouldn't buy juice at a certain price from Sunkist under those contracts and then sell it for [3438] a less price. That would be elemental. They wouldn't exercise their option to buy unless they were intending to sell at something that had some relationship to the price they bought it at.

How good that argument is, I am not going to pass on, or whether it would persuade me, but I think it is an argument available to plaintiffs.

I called attention of you gentlemen a long time ago to the price-fixing provision in the Silzle contract.

Mr. Fisher: Your Honor, I well remember that incident and what you said at the time when you referred to the February 1, 1952, amendment to the Silzle contract. You said, "Perhaps I am injecting into this case something that shouldn't be there," if I recall your Honor's words.

The evidence has explained that, and that it was

not the intention of the agreement that they fix the prices at which Silzle should sell.

The Court: That is your contention and you may argue that.

Mr. Fisher: I think all of the evidence points towards that, your Honor.

The Court: Here was a general allegation in the amended complaint. It is an allegation, as I recall, that was carried over from the first complaint. Certainly the defendants, with as able counsel as you have, must have had some inquiry [3439] or concern about how these contracts had the purpose and effect of unreasonably restraining interstate trade and commerce. I suppose you could have found out specifically what the plaintiffs meant by that.

My ruling will stand.

The Clerk: Is the amendment to be filed in writing or not?

Mr. Fisher: Your Honor, might we have a few minutes' recess to confer among ourselves?

The Court: For what purpose?

Mr. Fisher: To determine whether there is anything further we would want to present in this connection.

The Court: All right.

(Recess.) [3440]

Mr. Fisher: May the court please, without desiring to reargue the matter of the amendment, I would like to make this statement: That the defendants have been taken by surprise by the injection in the amended complaint of the charge of price fixing;

and, also, by paragraph XV of the proposed amendment, which is the one that brings in the Hyland-Stanford and General Foods matters, and which says there were other arrangements which gave EOP first call on the processing facilities of the company to the exclusion of other marketing cooperative associations, such as Independent Fruit Growers Association.

Now, we called no witnesses from Hyland-Stanford nor General Foods. We have not conferred with them, and in order to adequately combat that it would be necessary for us to confer with them and to produce evidence to combat it, and we, therefore, move for a continuance of the trial, and I will shorten it for a continuance until one week from today, in order to produce evidence with which to combat these two new features of the complaint.

Further, we would like to have until Friday morning in which to file our answers to the proposed amendments.

The Court: As to the price fixing features, I don't think you are taken by surprise. The contracts were contracts which your clients entered into, you knew what the contracts were, you knew from the date of the first complaint [3441] that there was a general reference to contracts generally; you knew what contracts were entered into. There was a reference in the first complaint filed to the Tree-Sweet contract. Subsequently, by amendment, there was a specific reference to the Silzle contract.

The court, itself, called attention at one time to

the price fixing features, which seemed to the court was clearly price fixing.

The amended complaint alleged that the contracts—and the original complaint also—have had the purpose and effect of unreasonably restraining interstate trade and commerce.

I would assume that competent counsel both here in Los Angeles, a firm in Corona, and a firm in Chicago, would attempt to analyze what was meant by that language, and proceedings could have been taken to find out definitely what particular effort or purpose the plaintiff was talking about. It is general language and proper language in the complaint.

I think the defendants have known all along that the plaintiffs were resting practically their entire case on the TreeSweet and Silzle contracts, and such inferences as they could argue to a jury that a jury might draw from those contracts.

Certainly, the price fixing element is an inference which a jury would be entitled to draw.

As to paragraph XV of the proposed amendment, you also [3442] must have contemplated when the contracts went into evidence, at the time the court told the jury the plaintiff was not relying on them for damages, but they were introduced for general purposes, that the plaintiff's would, therefore, make use of them generally in connection with the case.

And as to this particular thing that you talk about, maybe I read it differently than you do, but it says, "which gave defendant EOP first call on the processing facilities of said companies"——

I think that is right in the contracts, as I recall.

Mr. Dixon: That is correct.

The Court: Then the allegation says,

"to the exclusion of other marketing co-operative organizations, such as Independent Fruit Growers."

What plaintiff is probably going to argue—there is nothing said in the contract that excluded a particular independent or particular independents, but if the contract said it gave EOP first call on the facilities of Hyland-Stanford and General Foods, certainly the plaintiff would be entitled to argue that if EOP had first call on their facilities, therefore everybody else, including A, B, D, Independent Fruit Growers, any other co-operative, had second or third call, whatever it might be on the facilities.

As I see the record, there is no contention here that the contract makes that reference to it. [3443]

Plaintiff, in fact, is being fair with you and in substance telling you what it is going to argue to the jury, that is all it amounts to.

And if the plaintiff had argued this, without this amendment, and you had objected, I would not have stopped the plaintiff, because the contracts, as I recall, say that EOP has first call on the processing facilities. So supposing we got to the jury and the plaintiff had started to argue that and said under this contract EOP has got these companies tied up. if Independent Fruit Growers went to them to do work for them they would have to stand in line behind EOP, and if you had objected and said that is not a proper argument, I would have overruled you.

So all this amounts to is that the plaintiff is tell-

ing you in black and white what it is going to argue to the jury, and I think it is a proper argument.

How persuasive it will be, I don't know. You have got arguments that you can make. They may be more persuasive than the plaintiff's.

Now, as to time to answer, the procedure in this thing, I have two suggestions. I think a further Amended Complaint should be filed incorporating these provisions in it, so we will have something tangible here to work on. That should be filed promptly.

The defendants should have a right, if they desire, to [3444] file answers to this complaint as [3445] amended.

* * *

Mr. Dixon: Then for the record, your Honor, at this time we will make that decision and will dismiss the third cause of action set forth in the amended complaint.

The Court: All right. The motion is granted. The amended complaint, then, will contain the first two causes of action with only the changes as indicated by this amendment [3447] to conform to the proof.

Now, you can draw your answer accordingly.

Mr. Fisher: And will be served and filed when?

The Court: The plaintiff said they will have it in here Thursday morning, and I want the answer here Friday morning. You could have your answer ready to file before their complaint is in. There are no changes in number.

Mr. Fisher: We will do our best, your Honor.

The Court: You know exactly what the amend-

ments will be. It means work on the part of both of you.

The motion for continuance is denied.

* * *

(The following proceedings were had in chambers:)

The Court: First, the Federal Rules require the court to inform you as to what instructions the court is going to give. As a matter of practice, we follow the procedure in this district whereby at the conference we go over the instructions, try to reach agreements, if we can, and if not, the court tells you what instructions, at least in substance, he is going to give and what he is going to deny.

The rules provide that after the instructions are given, you are to be given an opportunity out of the presence [3448] of the jury to make your objections to the instructions.

In a big case, sometimes in a small one, that is difficult for the reason that instructions, of course, as read have no numbers, so we have adopted the practice here in Southern California and elsewhere in California of making our record at the conference and having a stipulation that at the time you are called to the bench after the jury is instructed, that you may then incorporate by reference the objections you have made here in chambers with the same force and effect as if you then repeated them, and you may make additional objections which might occur to you on the spur of the moment.

Sometimes you go over something in black and white, and then when you hear it read—I know I have stopped in the middle of reading something and knew that something was wrong, after we had torn it apart at conference.

There has been a case or two that wasn't too clear about it. That procedure I took up in the Las Vegas Plumbers case, 210 F. (2d) 732 at 744. I outlined the procedure and the Circuit agreed it was acceptable and also cited the other cases in which there might have been some question, so that the result was a summarization up to that time of what we have had, and I don't know of any case since then. It means authority in the Circuit for this procedure.

I don't see any question about it. If anybody has any objection, they can voice it, but you incorporate by [3449] reference the objections you make here in chambers with the same force and effect as if you made them again out there after the instructions were given, plus supplementing them, and it seems to me a much more orderly procedure.

* * *

Now, first, this is a very crude outline, but I want to give each of you a copy of it, some kind of outline of what we ought to cover in the instructions. There may be others you think should be added.

No. 3 can go out, can be stricken, which refers to the Robinson-Patman Act and the Clayton Act.

No. 4. You notice I say Judge James' general instructions. For you strangers here, Judge James

was a very fine judge we had on this bench, and he had a set of instructions on conspiracy that have been printed up and they are really the backbone of what we still have around here on [3450] conspiracy. I haven't pulled them out yet. The only trouble is they are lengthy. I may cut them down, because he went into conspiracy from one end to the other. As a matter of fact, I could either pull out what I am going to use or let you look at the whole document.

Mr. Fisher: Where is that found?

The Court: I don't know as it has ever been published. There have been printed copies kicking around here. I have a printed copy and I will be glad to let you take it overnight and you can look it over.

Mr. Fisher: We would appreciate that.

The Court: You knew Judge James?

Mr. Fisher: Yes.

The Court: You have a good idea that they are pretty thorough, then. That's the trouble with them. They are rather extensive.

5 is the monopoly question.

6 is proximate cause.

Public injury, 7.

8, statute of limitations.

Now, the defendants have proposed no instruction on the statute of limitations. I take it by that that you waive presentation of that question to the jury. Actually, it is a legal question.

Mr. Dixon: I don't think if is in the case.

The Court: Although it is treated as a defense.

I don't think it has any bearing with the jury, and if agreeable we will just strike it out of here.

Mr. Fowle: My recollection, your Honor, is that we did not propose an instruction on the statute of limitations question because I, at least, I think in the middle of the night somewhere along the line, assumed that your Honor's prior rulings had disposed of the matter.

The Court: That is my view. The only reason I left it in here is that you have it listed as a defense and I assumed you were not offering any because it is really a matter of law. I don't know as there is anything for the jury to decide on that. Either the pleadings are proper or they are not. It is a pleading question and not a proof question. I don't think there is any question of fact there, but I just call it to your attention in passing.

Mr. Fisher: May we reserve that?

The Court: All right, but you have proposed nothing on it and I think it has no place here.

9, that the damage must result from the specific acts or conduct alleged.

10, damages generally.

11, the defendants' exemptions.

12, how they lose the benefit of them.

13, the co-conspirators. [3452]

14, burden of proof on plaintiff.

You can strike out the form of verdict on the third count.

Now, that's a very broad outline. I think that we ought to keep it in mind in trying to work on these instructions.

Mr. Williams: I assume the attempt to monopolize is out in view of the amended complaint.

Mr. Dixon: Yes.

The Court: Were you basing that on the language of the Times-Picayune case?

Mr. Dixon: Yes, your Honor. I think it would probably be confusing to the jury in particular to have the attempt to monopolize charged in the case. That is the reason why I amended the complaint, to eliminate it.

The Court: Are you a mind reader?

Mr. Dixon: No, I am not, your Honor.

The Court: Because I just got through reading the Times-Picayune case.

Mr. Dixon: Well, I could have saved you the reading of it, your Honor. But there are sometimes some fine distinctions that can be drawn from the combination to monopolize and attempt to monopolize. I think in the present status of the law they are distinctions that are not perhaps warranted and are based on the assumption an attempt to monopolize requires a greater degree of proof in that it requires the [3453] proof of a specific intent.

The Court: Pardon me just a minute.

I think we will first take up these form instructions and run through those.

If you have any objections to them we will stop and you can make your objections, and I will rule on them as we go along.

I will identify them by this form number that we use.

Incidentally, in that connection you have this problem: When the instructions are read to the

jury of course the record as read is really the instructions, and I never file, very seldom file the instructions that I read from, because they are all marked up, so after the instructions are read they appear, of course, without any numbers, and I have had this problem come up before with counsel, and I think the simplest thing to do, in the event there is an appeal, is to go through them, have available my scratched-up set, and you can then insert in the record, if you want to, the numbers that we use in our conference. Then you have a record where you can refer to the instructions. Otherwise you have the problem of having to use the language. And you can save a lot of time if you will later number your instructions. As a matter of fact, the reporters might do that, or it could be done with ink in the record.

I am referring to the instructions after they are given to the jury. I think the easiest way to do would be for [3454] counsel to take my rough draft and merely number the transcript.

Mr. Fisher: That is agreeable.

Mr. Dixon: That is agreeable to plaintiff.

The Court: I propose to give Court's 1, the province of the Court, and Court's 2, province of the jury. And in the blank that you have there, where it says "the complaint of the plaintiff," I would insert "Winckler & Smith Citrus Products Company, and Ronald Walker, Trustee and Intervener."

That is right out of the caption of the complaint.

And then in the other blank, "the defendant

Sunkist Growers, Inc., a corporation, sued as the California Fruit Growers Exchange, and the Exchange Orange Products Company, a corporation."

Court's 2-A, all persons equal.

Mr. Fowle: If the Court please, on No. 2-A it just occurred to me that that didn't quite fit this situation. I mean it is as though an individual were suing a corporation. I just wonder—I wouldn't say we have any specific objection to it.

The Court: We can change it.

Mr. Fowle: You see what I mean. You don't have an individual.

Mr. Dixon: Take the words "persons including" out if you want to.

The Court: The trustee is a person. [3455]

Mr. Dixon: That is true.

The Court: Actually the thing is put in to guard against a situation where some juror may say, "The defendant is a corporation, so what are we worrying about?"

That is what it was put in for.

Mr. Fowle: Yes.

The Court: You do have an individual here as a trustee, one of the plaintiffs.

Mr. Fowle: He stands in the shoes of the plaintiff, does he not?

The Court: Or the plaintiff stands in his shoes. I don't know which it is.

Mr. Fowle: His rights are no greater or no different, as far as the defendants are concerned, than the rights of the Winckler-Smith company.

The Court: I seriously question whether the

corporation, itself, has any right. I think the intervening trustee has probably all the rights.

Mr. Fisher: I am not so sure that that is true. I remember investigating it at the time it first came up, and the trustee, I believe, had one of two choices: either to be substituted as party plaintiff or to intervene. I think in either event he would have no greater rights in the lawsuit than the corporation would have.

The Court: What about just using the first sentence? [3456]

Mr. Dixon: I think the whole thing——

The Court: I see no harm in that.

Mr. Dixon: The first sentence is all right as far as the plaintiff is concerned.

Mr. Fisher: I think the first sentence would be preferable.

Mr. Fowle: All right.

Mr. Dixon: Take the second and third out?

Mr. Fisher: Yes.

The Court: All right.

Court's 3, preponderance of the evidence.

These are the ones I propose to give.

Court's 4, direct and indirect evidence.

Mr. Fowle: I had one question about that, your Honor. The reference to presumptions, here; are there going to be instructions with respect to presumptions?

The Court: First the question is, are there any presumptions in the case, and I have often wondered about it, too. But the obvious answer is that you have the presumption of a witness telling

the truth. Any time you have a live witness you always have that presumption.

What other presumptions there are, I don't know. I customarily give it.

Mr. Fowle: Well, I don't suppose we have any objection to it. [3457]

The Court: Court's 5, evidence and stipulations.

Court's 6, credibility of witnesses, discrepancies.

Court's 6-A, opinion evidence.

Court's 7, impeachment.

Court's 8, burden of proof, demonstration not required.

Mr. Fowle: I would have one comment to make there. As your Honor knows, we have submitted a couple of proposed instructions that are related to this, and I think we would want an instruction which tells the jury that if their minds are in even balance they must find for the defendants, or if they are faced with a situation from which you can draw one of two inferences, one, that the conduct in question was lawful, one that the conduct in question was unlawful, they must draw the inference that the conduct in question was lawful, provided the two inferences are equally—or the conduct is susceptible of the two inferences on an equal basis.

The Court: That is why I go over these things first and then get them out of the way, and then certain of your instructions are eliminated, from both sides, and whether I give that, or not, we will see when we get there. We will take yours up later.

That is a customary instruction in criminal cases,

but you don't have a request for it very often in civil cases.

And in criminal cases, the one instruction they always used to request was that the verdict must be consistent with [3458] all reasonable hypotheses of guilt and inconsistent with all reasonable hypotheses of innocence, and Tom Clark here within the last year in a decision by the Supreme Court analyzed the criminal cases and held it was a confusing instruction, and we have eliminated it in our criminal instructions. It is not exactly the same problem. We will get to that later.

No. 9, the number of witnesses.

No. 10, a single witness.

Now, 12-A, we would have to change. I don't know whether either one of you have done any work on it or not. Maybe 12-A is not the one. There is one of them we have to change.

Mr. Fowle: It deals with proximate cause.

Mr. Dixon: I think, your Honor, I noticed that what follows appears to deal primarily with personal injury cases. I am not sure whether that was the intention of the instruction.

The Court: That is the one I was talking about to modify.

Mr. Fowle: Is that 12-B?

The Court: Yes, 12-B.

12-A is a general definition of proximate cause.

12-B is more than one proximate cause.

I had roughed up an instruction to the effect that the burden was on the plaintiff to show that their injury, if any, was the result of acts and conduct,

but that there might be more than one cause, and on the question of causation if the jury found that acts and conduct were not any cause, [3459] then the verdict should be for the defendant. But if they found that acts and conduct of the defendants were one cause, co-operating with other causes, then the verdict on the issue of causation would be for the plaintiff. In other words, as long as wrongful acts of the plaintiffs were one of the proximate causes——

Mr. Dixon: You mean the defendants?

The Court: Of the defendants, was one of the proximate causes, then the plaintiff is not out on the question of causation.

Mr. Fowle: Might we wait until we see the instruction?

The Court: Yes, I think we had better lay 12-B aside and consider it later. [3460]

Now, 12-C. Some instruction along this line should be given, but whether this is the one or not is the question. It may have to be changed. If we use this, negligence would have to go out.

By the way, can you stipulate that this 16 man executive committee acted as agent for the defendants?

Mr. Dixon: I think the record shows, your Honor, not only the 16 man executive committee, but also the so-called four member management committee was actually operating the business of Sunkist and Exchange Orange.

Mr. Williams: Are you taking into consideration the Capper-Volstead scope of exemptions?

Mr. Dixon: This is on agency.

Mr. Fowle: As I recall it, the evidence is that the 16 man joint executive committee ran the products department of Sunkist and that's all, and the evidence with respect to the so-called four man management committee is to the effect that it really wasn't a committee at all. It was just four managers who met. They had no formal status and it was not a committee that ran a business or anything.

Mr. Dixon: It certainly ran the business of Sunkist and Exchange Orange.

Mr. Fowle: I agree you tried to make it look that way.

Mr. Dixon: If they didn't, who did? They testified they had the sole function of setting prices, and so on, and [3461] so forth, and they all were responsible to your 16-man executive committee.

The Court: Well, let's take one thing at a time.

Mr. Fisher: We couldn't stipulate to anything like that.

The Court: First, as far as the 16 man executive committee composed of officials of Orange and Lemon, can it be agreed they acted for and in behalf of Sunkist?

Mr. Williams: How do we get Lemon in there?

The Court: That is what the 16 man committee was made up.

Mr. Fisher: The 16 man executive committee was made up of eight from the board of Exchange Orange Products and eight from the board of Exchange Lemon Products.

The Court: That's right, and they acted for and in behalf of Sunkist, didn't they?

Mr. Fisher: No. As a matter of fact, their duties, their organization, with respect to what we have here in controversy, their function was the products department of Sunkist and not the processing by Exchange Orange Products at all.

Mr. Dixon: Let me ask this question. Is it the position of the defendants that the acts complained of here were not performed by officials of Sunkist and Exchange Orange pursuant to the performance of their duties? You have put in nothing thus far to indicate that. [3462]

The Court: Well, let's pass it up if you can't get a stipulation. I will rough up something here. I don't think either one of you has proposed anything. I will use part of 12-C and I will probably say something like this.

That Sunkist and Exchange Orange, Exchange Lemon, Silzle, TreeSweet, or whatever it is, are corporations; that corporations can only act through their officers, agents or employees, or through boards or committees, and so forth, that may be set up.

That is a question of fact for the jury to determine, in whose behalf the 16 man executive committee and the so-called four man committee—probably just call it the four man committee, not executive committee—acted. That leaves it wide open.

I thought probably there might have been some agreement on it and I could put your stipulation

in, but I am afraid you are not going to be able to agree. I will rough something up on that.

Are there any other committees involved here, or boards?

Mr. Dixon: They have the executive committee of Exchange Orange in addition to the 16 member executive committee.

The Court: All right. Pass up 12-D also because that is slanted towards a negligence case. What I was thinking [3463] about were the various concurrent causes.

I will give 13, striking out reference to the accident, and changing his to its. It will be something like this.

Plaintiff alleges that it has sustained injury resulting proximately from the six specific items or matters set forth in the second amended complaint, and has sustained general damages in the sum of—what did your complaint pray for? $600,000?

Mr. Dixon: I think so, Judge. Six or eight.

The Court: Well, I have got it right here.

Mr. Fisher: I think it was eight.

Mr. Dixon: I think it was eight, judge. Yes, it was.

The Court: $800,000. Not prayed. Your prayer would be trebled.

Mr. Dixon: Well, claimed.

The Court: Strike out the additional damages, and so forth. These allegations are not evidence of the plaintiff's claim and must not be considered by you as evidence.

Mr. Fowle: I am not quite sure I follow this. In the general sum of——

The Court: The same, general damages in the sum of $800,000 period.

Mr. Fowle: That's all there is to the first paragraph?

The Court: It will read: [3464]

The plaintiff alleges it sustained injury proximately resulting from the six specific items or matters set forth in the second amended complaint, which I am going to tell them about later, and has sustained general damages in the sum of $800,000. These allegations, and so forth, are not evidence.

Then 13-A is much the same.

13-D. I will have to change "him" to "it" and things of that sort.

Mr. Dixon: You will have to add, "the acts complained of" instead of "accident," won't you?

The Court: Yes, "acts complained of."

13-E, speculative damages, not permitted to award them.

13-G, polling plan, they cannot go in and write down averages.

15, court's comments on the evidence.

16, court's questions to the witnesses.

17, effect of instruction on damages.

18, duty to deliberate together. Verdict must be unanimous.

Mr. Fowle: May we pause for just a moment, your Honor?

The Court: Yes. Which one are you looking at?

Mr. Fowle: Looking at the last paragraph of 18.

The Court: 19, communications from the [3465] jury.

20, election of foreman and form of verdict.

Mr. Fowle: I would like to say in connection with that that we haven't yet, and perhaps won't be able to phrase them, but we have in mind submitting to your Honor requests for special interrogatories to the jury along with the general verdict.

The Court: What type of special interrogatories?

Mr. Fowle: Well, just as an example, we had in mind a special interrogatory which would ask whether or not the jury finds that there is public injury, and which would ask whether or not the jury finds that there is a conspiracy consisting of so-and-so, so-and-so, so-and-so, and so-and-so; whether or not each of the six acts performed were performed pursuant to the conspiracy with the purpose and effect of eliminating the plaintiff as a competitor. Things of that sort.

Until we had a conference of this sort with your Honor, we weren't quite ready to frame these interrogatories. It takes some pretty close work to get them exactly right.

The Court: I was thinking about this the other night. I am not as bad off as you fellows, but I wake up at night thinking about this case. I was thinking about, of course, the third cause, which is now out.

I was thinking about the first two causes, and if

there was a general verdict for the plaintiff, I was thinking [3466] of possibly one interrogatory.

Have you based your verdict on, one, Section 1 of the Sherman Act, conspiracy, combination and contract; Section 2 of the Sherman Act, monopoly; 3, or both. I think the jury is entitled to base it on base or one or the other. However, I think the giving of special interrogatories is in the discretion of the court. I had a sad experience on special interrogatories. It turned out all right. But when I tried the treason case, I proposed 13 special interrogatories on the 13 overt acts in the case. Judge Mathes then went me one better and he proposed 104 special interrogatories. He took each overt act as applied to the indictment and broke the indictment down into the elements, and—what did he have? Eight acts. He had eight elements included, so he had eight times thirteen. He had 104 acts or interrogatories that he gave the jury. That almost killed me when that happened.

The windup of it may have been all right, because when the jury finally came in, they had been out a week and there was a contention made the jury had been coerced, but the jury found about 18 of the overt acts. They went down them, the first six, skipped seven, went to eight, filled it out, then skipped nine, went to eleven. So we had a beautiful argument that the jury couldn't have been coerced. They had 104 special interrogatories to fill out and it showed they [3467] had been deliberating, picking and choosing, and so forth.

But you can overdo this special interrogatory.

special verdict business. I think anything we do in that regard has got to be reasonable.

Mr. Fowle: We had not intended to submit anything like 100 interrogatories, I can assure you that. [3468]

The Court: I hope not.

Mr. Fowle: I don't have time, none of us have time, Judge, to put together 100 interrogatories. It is difficult enough to put together a dozen.

The Court: Tell me, on this law of civil conspiracy have you got any law to the effect that you have to have a finding on which of the specific acts in the complaint they base their verdict upon?

Mr. Fowle: I don't believe so.

The Court: You see, as a matter of fact on the criminal side where the rule is much stricter, it never opened that up, except possibly in the treason cases, where in a footnote the Supreme Court had indicated there should be separate verdicts, or interrogatories as to the overt acts. But in your criminal cases, for instance, if the man is charged with forging and uttering, while it goes to the jury on a general verdict of guilty or not guilty.

Some day a court may open it up in criminal cases, but they never have.

But I don't know of any civil cases, take a negligence case where you allege the plaintiff was speeding, that he didn't have his lights on, and half a dozen things, and it goes to the jury on a general verdict, and that is the end of it.

I would like to avoid making as much new law in this [3469] case as we can.

We will talk about it later when you get them ready.

When will you have them ready?

Mr. Fowle: I would think we would have them ready by Thursday morning.

The Court: I am going to take up plaintiff's instructions first, but pause for one minute on defendants' instructions.

You have a series of instructions on directed verdicts, and we can eliminate those instructions right now.

I propose to reject defendants' A and B. And C is out.

Is there any record that you want to make on that?

Mr. Fowle: In that connection, your Honor, we propose of course to make a motion for a directed verdict at the close of all the evidence, in any case, and we felt that in tendering instructions we would be remiss if we didn't include such instructions as this, and we will simply object, to make our record, to the refusal of the court to give such instructions.

The Court: You may also incorporate by reference the motion for directed verdict that you are going to make. This merely is putting in black and white and raising the same question another way. It is satisfactory to me that this motion you are going to make, and the grounds and reasons for it, may be incorporated as part of your record why I should give A and B.

Is that satisfactory? [3470]

Mr. Fowle: Yes.

The Court: Now, skipping. Defendant's Instruction 26 is out, because of the dismissal of the third cause. These were all instructions for directed verdicts.

27 is out.

Mr. Fowle: I take it you are referring to the plaintiffs'?

The Court: No. Defendants'. I am just eliminating some of these matters.

28 is out.

29 is out.

30 is out.

31 is out.

32 is out.

33 is out.

They all concern the third cause.

Now, taking up the plaintiffs'.

Plaintiffs' 1 I would reject on the ground it has been covered by my general instructions.

Is that satisfactory?

Mr. Dixon: Yes.

The Court: Plaintiffs' 2.

Mr. Dixon: The words "of combining" should be inserted after the word "guilty" on line 5.

Mr. Williams: Object to this instruction upon the ground that under the evidence Exchange Orange and Sunkist [3471] Growers cannot conspire under the Capper-Volstead Act, because they are both co-operatives owned by the same growers.

The Court: Let me ask you, are you going to leave Lemon in the case?

Mr. Dixon: Only as a co-conspirator, your Honor. The subject matter of the restraint here, of course, is citrus products, primarily single-strength citrus juice. Exchange Lemon comes into the picture perhaps in two ways. First, as a processor at cost for Exchange Orange, which, standing alone, of course, would be perfectly proper and legal.

And, second, in making lemons available to Tree-Sweet under a basis other than a direct sale.

That is the only way in which they come into this case at all, and for that reason they were dismissed from the case.

The Court: Are you going to rely upon the two acts which are part of six that involve Lemon processing for Orange and Orange processing for Lemon?

Mr. Dixon: No. It is part of the evidence which shows the existence of a combination between two co-operatives. In other words, there isn't any question but what Sunkist and Exchange Lemon are separate corporations. It is obviously of aid to any combination of the kind alleged in the complaint here for Lemon to make its facilities available to Orange, and vice versa, and in addjtion thereto, to prefer and make available its product, as it did, to TreeSweet. [3472]

The Court: Are you going to withdraw those two items as causes of damage?

Mr. Dixon: Yes; I think they can be withdrawn, except as part of the agreement or combination charged in the complaint.

The Court: Well, you analyzed it. It seems to me in view of the Capper-Volstead Act and the Clayton Act, that these co-operatives could conspire with third parties.

Mr. Dixon: Could?

The Court: Yes; could.

Mr. Dixon: Yes.

The Court: But I have trouble seeing how they could conspire merely between themselves. In other words, they are given this broad exemption, and supposing they sat down—there are two boards of directors—and they said, Look, we have got protection under these two Acts, and my gosh, we are going to monopolize 100 per cent of the——

Mr. Dixon: They could do it, your Honor, by making the contracts that they made with Tree-Sweet and Silzle. That is perfectly easy. They could agree. In other words, the evidence here is that Sunkist sold the Valencias. Exchange Orange processed them. But the deal here that is complained of is made with Exchange Orange and TreeSweet and Silzle, as well as the control over the price of Valencias, which was determined by Sunkist. [3473]

I mean the evidence here——

The Court: What I am thinking about is this, to sum it up: an instruction something like this I would give if there was added to it that they could conspire with third persons.

Mr. Dixon: We assume they can conspire with third persons. But my point is—the reason for this instruction, your Honor, is this: Let's suppose the jury felt, for instance, that Silzle was not a party to

any conspiracy, let's assume that the jury felt that TreeSweet felt this was a good deal for them and went along with it because they got all these things, and so forth, that they got under the contract, that would still not preclude Sunkist and Exchange Orange from combining their joint facilities for the purpose of restraining trade in citrus juices.

The Court: By the use of the Silzle and Tree-Sweet contracts?

Mr. Dixon: That is correct.

The Court: I would go along with you on that.

Mr. Dixon: That is all this instruction means.

The Court: But then you would have to say more. In other words, as it now reads it would apply only to their own facilities, it wouldn't talk about any other contracts or any other conspirators. And I don't think they can conspire that way.

Mr. Dixon: Your Honor, let me say this. I would agree [3474] 100 per cent that this case wouldn't be before your Honor if Sunkist and Exchange Orange, and even Exchange Lemon, just operated between themselves as such in processing contracts, because they have a legal right to enter into processing contracts with each other.

But even there, assuming the evidence justified such a charge, a perfectly legal contract, which could be made between Sunkist or Exchange Orange and Exchange Lemon, to process, might be illegal if part of a combination between the co-ops to dominate and control the citrus juice market.

In other words, if you concede that they are separate entities, my point is this, your Honor—and

that is the only purpose of this requested instruction —if you concede that they are separate entities, then I think you must concede that they are capable, even as between themselves, of combining to restrain trade and commerce. They do it by saying, Here, we will make a deal with TreeSweet. TreeSweet will take the deal.

It doesn't necessarily follow that TreeSweet has to be a member of the combination. Because it is always within the control of Sunkist or Exchange Orange to make or not make the deal. And that is my point.

It isn't necessary to establish liability on the defendant in this case, necessarily, that the jury would find that even TreeSweet was a party to the combination charged. Because [3475] under Section 2 of the Sherman Act, the second cause of action so-called, the charge is that they conspired together, of course with any others, as the evidence may justify, but it is sufficient that they could do it between themselves to monopolize the citrus juice market. Why? Because the evidence here is clear, and I don't think Mr. Finley is going to change it any, that they didn't have the facilities that they wanted to process all of their products into citrus juice themselves.

That they have a right to do, there is no question about it. But when they decide, Well, we will make a deal here, go out and make a deal with an independent processor and give them this kind of a deal, and don't include others, and the effect of their action is to restrain trade, or to add up to a combi-

nation to control and monopolize the citrus juice market, then they have violated the law. But it doesn't necessarily follow that the plaintiff could not prevail if the jury would decide that TreeSweet wasn't a member of the combination, or Silzle. That is my point, your Honor.

The Court: It boils down to this——

Mr. Dixon: That they made contracts.

The Court: ——that they can conspire, if they conspire with others other than the corporate units of the Sunkist marketing organization, or if they conspire concerning the use of processing facilities other than their own? That is what [3476] you are saying, isn't it?

Mr. Dixon: In substance; yes.

The Court: You are saying, supposing they found TreeSweet was not a conspirator, you say, nevertheless, they could conspire on TreeSweet facilities?

Mr. Dixon: Yes; which would give them a preferential deal which would enable them to control the citrus juice market. And that is where these contracts, and so on, come into the picture. Not as evidence, necessarily, of any damage to the plaintiff, but as evidence of the existence of the combination charged.

In other words, the evidence is not in dispute here that both Sunkist and TreeSweet and Silzle, all three of them, were in competition with each other in the single-strength market. And yet the contracts that were made here were such that the effect of them was that TreeSweet and Silzle sold the prod-

ucts allegedly purchased under the agreement at substantially the same price as the Sunkist selling price, which is tampering with the price structure, certainly, of the single-strength products sold by those three companies. [3477]

May I say this further, your Honor, that there is nothing in the Capper-Volstead Act or in any other act that I know of that gives to a marking co-op any rights except to combine together, for the growers to combine together and to market their products. That is the thing that the Capper-Volstead Act permits. It is a permissive act. In other words, if it wasn't for the Capper-Volstead Act, then the producers, that is the growers of the fruit, the so-called members, would be violating the antitrust laws by combining together to sell their products and to fix the price at which they will be sold. That is what the Capper-Volstead Act permits and that's all. They are not given a general exemption from the antitrust laws, any more than labor unions are, or anything else, although there is a little different situation there, or any more than the fishermen's organizations, combinations of fishermen to get together to sell their product or market their product. That doesn't permit them to fix prices in the market.

Sunkist in 1941 were indicted and a civil suit was filed against them to which they entered pleas of nolo contendere and a consent judgment in this court. However, in that case the facts were that they combined together with auction people in the various markets of the country to control the prices

at which oranges would be sold. However, under the Keifer-Seagram case—— [3478]

Mr. Fisher: Of course, we will object to any reference to that.

Mr. Dixon: That isn't going to be injected in the case. I am not contending that. I am only using it as an illustration.

Under the Keifer-Seagram case, Sunkist and Exchange Orange, without anybody else, your Honor, can combine together to violate the antitrust laws.

The Court: Without the use of other facilities?

Mr. Dixon: Yes. Now, it is true that it depends again on what they did, as to whether what they did violated the law. The burden is still on the plaintiff to show what they did added up to restraint of trade or monopolization or combination to monopolize the citrus juice market represented by that part of it which is processed here in California.

But I don't want to be in the position in this case where, for example, the defendants could say, "Well, Silzle wasn't a party to this combination, and TreeSweet wasn't a party to the combination. Therefore, you fail in your proof." That is my argument. That is the reason for my position here. Because this whole case, your Honor, stems primarily from the fact that the evidence is not in dispute here that the product that was necessary for the plaintiffs to remain in business, namely, the Valencia oranges, was monopolized.

You may decide to leave that question to the jury. [3479] But that is the basic fact which under-

lies this claim, and if the jury so finds or if your Honor so instructs, and I think you could do the latter properly on the evidence in this case, then it is the abuse of that monopoly power by the action of the defendants here, wholly apart from what they may have done, particularly in refusing, and Silzle didn't have anything to do with refusing, they weren't concerned with it, probably, in refusing to make oranges available to this plaintiff. That is the action of the defendant Exchange Orange as well as of Sunkist.

That is why I don't want to be in a position where we would be deprived of the right to make that argument. I don't think the law so provides, because they have no exemption here from the application of the law as laid down by the Supreme Court in the Seagram case, in my judgment. Merely because they are a cooperative organization, under the Capper-Volstead Act, does not put them in a different position than any other corporation or its subsidiary.

The Court: Let me ask you if you would be content with this. Your argument goes a step further, but I think this has everything in it you need to make your arguments. Taking it as it stands, and adding—well, picking up the last part of it——

Can accordingly conspire together to violate Sections 1 and 2 of the Sherman Act as charged in the first and [3480] second causes of action. If they conspire with other parties other than corporate units of Sunkist marketing system, or if they conspire concerning use of processing facilities other

than their own, their activities solely within the Sunkist marketing system, standing alone, cannot constitute a conspiracy.

Mr. Dixon: I think that is misleading, your Honor, because it doesn't cover the situation I mentioned.

The Court: I have some other instructions I am going to give you tonight to take home with you, but I might say that I would, of course, instruct the jury that the instructions must be read together. I don't know whether I have a form instruction on that here. Is that included in there?

Mr. Fowle: I don't recall it.

Mr. Dixon: I don't think it is included in the ones you gave us, your Honor.

The Court: I generally give that. They can't pick out one instruction. Otherwise, if you tried to make each instruction a complete unit, you never could do it. Instructions must be read together.

Mr. Dixon: This instruction goes a—pardon me, your Honor.

The Court: So I may say just subject to other instructions which I give you concerning exemptions under the Capper-Volstead Act. [3481]

Let me ask the defendants if they object to an instruction that would have what is in 2, plus a statement, subject to other instructions.

Mr. Williams: Yes, your Honor; we would. Our view is that the members of the Sunkist system should be treated as a single unit, just as if they were one company. That means if they conspire with TreeSweet or with Silzle, they are subject to

the antitrust laws, but under the Capper-Volstead Act, it is our position that they cannot conspire among themselves for this reason. The Capper-Volstead Act gives the exemption not to a corporation, but to the growers, and it states persons engaged in the production of agricultural products, as farmers or fruit growers, may act together in associations. That is a plural. It is not singular. It doesn't say act together in an association or the association, but it is plural. Here we have the same group of growers with a single exemption acting together through two or three corporations, depending on whether you consider Exchange Lemon as part of it.

Then the statute goes on to read, acting together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce such products of persons so engaged.

We are not concerned here with, say, a milk co-operative [3482] and a cheese co-operative conspiring, which is a question that has not been decided by the courts. We are dealing here with whether or not co-operatives that are in several different corporate forms but are owned by the same set of growers and possess a single exemption, can conspire. It has never been decided. Our position is under the language of the Capper-Volstead Act they must be treated as a single unit.

So your instruction in our estimation should state that these companies cannot conspire between

themselves, but they can be considered as acting as if they were a single co-operative, and to that extent, of course——

The Court: I think you are wrong, that they can't conspire among themselves. Apparently what I proposed didn't satisfy Mr. Dixon, but I think the easiest example of that would be, suppose there were no other conspirators except the two co-operatives, and suppose they sat down, and let's take a clear-cut, agreed-upon conspiracy, and they said, "We will use our facilities and we will go out and make contracts with every other processor except A, B and C. We will run A, B and C out of business. They have been giving us the most trouble. Then by the use of your facilities together with ours, we will do so-and-so."

There they have plainly stepped outside, I think, of their statutory exemption, and yet there is no other—on [3483] the supposed facts—no other conspirator except them.

That is why I was trying to say something about using other facilities, or other co-conspirators might do it. I think that is an example that I don't think you would argue.

Mr. Williams: Yes, your Honor; I would argue that the example you gave—suppose we treat it as a unit, like I suggested. As a unit they could be guilty of attempted monopolization or monopolization. The example, I take it, the one you gave, would fall under one of those. That would be an offense under the antitrust laws.

But my point is they are not guilty of conspiracy.

They are guilty of either attempt to monopolize or monopolizing. If you treat it as a unit, they are subject to the antitrust laws to the full extent Congress intended them to be.

The Court: I am going to give something. I am going to do one of two things, I think. I am either going to give this instruction with the tag on it that they can conspire with others, or they can conspire to use other processing facilities other than their own, or I am merely going to give it with, "subject to other instructions concerning the Capper-Volstead Act and Section 6 of the Clayton Act and the exemptions contained therein." Then when I get to these acts, I can take up the exemptions.

Mr. Fowle: I might add this one statement. We wouldn't say for a second that these co-ops couldn't conspire with third parties [3484] but none of these cases have gone any further than that. None of these cases have gone so far as to say they couldn't conspire among themselves.

The Court: You should decide how many questions you want to put into this case. I thought what I had inserted there gave you a right to argue everything you want to argue, anyway.

Mr. Dixon: Your Honor, you limit it to processing, and that is the very question raised in a sense by the TreeSweet and Silzle contracts. Are they proper processing contracts? As I have indicated, in some of the instructions I have submitted to your Honor, I do not question the fact that a co-op can enter into a processing contract.

The Court: I have got an instruction on that where I start out and say that these defendants could process between themselves and with each other, but as soon as they enter into processing contracts with third parties, then questions may arise, and then go ahead and develop that.

Mr. Dixon: Let me illustrate my point, your Honor, by this statement, which is also covered in some of our suggested instructions here. Let's assume that they can make that type of a contract, and they can, without any question, between another co-op, a processing contract. It is a basic and fundamental principle of law that is particularly applicable to antitrust cases, that a legal contract that would be [3485] within that category, when used for or to perfect an illegal purpose, which is an unreasonable restraint of trade, or to perfect a monopoly, or to exercise monopoly control for the purpose of restraint of trade, and so on, becomes illegal.

As I said, I have tried some cases on co-ops, the Fishermen's Co-op, and so forth, and there is nothing, I say to your Honor, in the Supreme Court cases or any other case to my knowledge that says what the defendants are contending for here, namely, that they cannot conspire between themselves or with their subsidiaries for the purpose of restraining trade or for monopolizing a particular phase of the market.

Now, what your Honor has suggested is that they can conspire and violate the law by other means. My only objection to your Honor's suggestion is that that instruction, I think, and I don't believe that

the Capper-Volstead Act or any of these exemptive acts, so-called, ever intended to give the corporations involved or the producers involved any exemption from the antitrust laws other than to exempt them from its operation where they combine together, which would otherwise be an illegal conspiracy——

The Court: Excuse me. I have a telephone call.

(Interruption.)

Mr. Dixon: To finish my sentence—for the purpose of processing and marketing the products of their grower members. I wanted to finish the sentence. [3486]

The Court: All right.

Mr. Dixon: You will see that it reads all right.

The Court: Let's pass it and I will look at it further. You look at some of the stuff I worked up.

Plaintiffs' 3. That looks all right to me. Do the defendants have any objection to it?

Mr. Williams: We have another one to suggest in its place.

The Court: Is it one you submitted?

Mr. Fowle: It is a new one.

The Court: How many new ones are you going to submit?

Mr. Fowle: Not very many.

The Court: I would like to have them submitted so that I can be looking at them. If you only have a few, I will not glang the gate on you, but don't bring me a flock of them at the last minute.

Mr. Fowle: No, sir.

The Court: Well, they are both general statements, I suppose, but I don't see anything wrong with the plaintiffs'.

Mr. Williams: For one thing, we don't think there should be any reference to foreign trade. There is no foreign trade involved here.

The Court: All right. Strike out foreign trade. Interstate trade and commerce. I will give Plaintiffs' 3 and probably reject your 35. [3487]

Mr. Fowle: Are you rejecting this one, your Honor?

The Court: Yes. Do you want to make a record on it? We will do it while we are at it.

Mr. Fowle: We wish to record an objection to the refusal to give this instruction.

The Court: All right. Plaintiffs' 4.

Mr. Williams: We object to this one, your Honor, on the ground that it stresses the private injury over the public injury, when the purpose of the Sherman Act is to protect—the paramount purpose is to protect the public, not private individuals, and that is well pointed out in the Paramount Famous Lasky Corporation case, which was cited in support of jury instruction No. 3 of the plaintiff, in which the court said:

"Founded upon broad concepts of public policy, the prohibitions of the statute"—that is the Sherman Act—"were enacted to prevent not the mere injury to an individual which arises in the doing of the prohibitive act, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented." [3488]

The Court: Well, I have a note here on this. I was going to give this one and add to it this statement:

"This is a general statement and is subject to the more particular instructions contained herein."

It is a very general statement. I don't think it is an error, but I think it is one of those cases where you ought to flag it with more particular instructions, which, of course, will be private injury, and that sort of thing.

Mr. Williams: We would like to request that there be some statement coupled with it and incorporated in the same instruction that points out that the purpose of the statute was not to prevent mere injury to an individual, but was to prevent public injury. It is founded upon broad conceptions of public policy, and thus address the public part of it.

The Court: Objection overruled. I will give it with the addition that I added.

No. 5.

I have it listed as okay. What is the defendants' objection to it?

Mr. Williams: We have several objections to that. The first is that the jury should pass upon the issue of fact as to whether citrus juices produced in California constitute a market which is an area of effective competition subject to being monopolized.

This instruction assumes that California citrus juices [3489] and single-strength orange juice are such products, and we think it is an issue under the evidence.

The second objection is that under the complaint

it should be citrus juices, and not citrus juice products.

A further objection is that the instruction assumes that it is unlawful to monopolize a product produced in a certain geographical area.

That is not true under the statute.

The statute strikes at monopolizing a particular market. It may be a geographical market; it is never a producing area.

That can be illustrated. Supposing, for example, there were two companies manufacturing pencils in a state such as California, and there were a thousand companies manufacturing pencils elsewhere, suppose one of those companies drove the other out of business—or supposing there were three companies and two conspired to drive the other one out of business, it would not be an offense, because you could not say that they had conspired to monopolize pencils produced in California.

We have to deal only with selling markets and not where items are produced.

Those are several of the objections that we have to No. 5.

Mr. Dixon: If this isn't a violation, then we have [3490] been wasting about two months here in court.

It seems to me quite clear that we have, and the record shows, really two places where citrus juices and juice products are made, in California and in Florida. Now, certainly all of the citrus juices which are processed here are the subject of restraint and monopoly, particularly if they could not be

produced by competitors of the defendants, and TreeSweet and Silzle as the record shows.

In other words, the next instruction, your Honor, makes it clear that Sections 1 and 2 of the Sherman Act, not just Section 2, but Sections 1 and 2, have a geographical and distributive significance, and the Supreme Court has so stated, not only in the case cited in requested instruction No. 6, but many other cases where the occasions arose.

You don't have to monopolize the whole market or all of the products that go into the market, in order to violate the Sherman Act.

If there were true you would never get a violation under the Sherman Act.

If defendants aren't capable here of restraining trade in commerce in citrus juices and juice products processed in California and sold in commerce, then I am frank to say that we should have been dismissed out of this case months ago.

The Court: What do you say to the fact about citrus [3491] juice products?

Mr. Dixon: That might be changed, your Honor. I referred to them I think in the complaint in that manner. Citrus juice products, I think, as defined in the complaint means frozen concentrates, and so on. Let me see.

The term used here originally was citrus fruit juice, referring to natural and frozen concentrate.

The Court: In paragraph 2, Section 1 of the Sherman Act, you say "canned citrus fruit juice."

Mr. Dixon: Yes. I think I used, perhaps, the language there. I have no objection to changing it

to "citrus fruit juices" instead of citrus—and other citrus fruit juices.

Mr. Williams: That would meet that point.

The Court: Under the allegations of the complaint——

Mr. Dixon: That would mean natural and frozen concentrate.

The Court: Do you understand that?

Mr. Williams: Yes.

Mr. Dixon: I have no objection to amending it to conform to the complaint, citrus fruit juices.

Mr. Williams: As we understand the complaint, it charges restraint of citrus fruit juices.

Mr. Dixon: But it would have to be combined with what it meant.

Mr. Williams: Not just Valencia orange juice. It is [3492] all juices.

Mr. Dixon: As used in the complaint. If you want me to use that term, all right. I used it here in the interest of making it unnecessary to have any further definition of it, but if you are not satisfied with the words "citrus juice products" I have no objection to changing it.

Mr. Williams: It raises a question as to the scope of the complaint and how the instructions are to be phrased. Now, the complaint speaks of citrus juices, not of single-strength orange juice or single-strength Valencia orange juice.

Mr. Dixon: It refers to single-strength.

Mr. Williams: The instruction ought to be consistent with the complaint. Unless the complaint is

amended to limit it to Valencia single-strength orange juice.

Mr. Dixon: I am perfectly willing to use the language of the complaint.

Mr. Williams: We ought to strike "single-strength orange juice" and say "citrus juices."

Mr. Dixon: I don't agree at all. The subject of the complaint all the way through is particularly single-strength orange juice, but this plaintiff was also engaged and was about to expand its operations into the frozen concentrate field, and that is one of the elements of damage here.

Mr. Williams: That is included in the term "citrus [3493] juices."

Mr. Dixon: If it is, all right. I thought it was clear in this instruction, but I have no objection to anything that will make it more clear, if you think it needs clarification. As long as it doesn't change the substance of it.

The Court: The defendants say this takes from the jury a question of fact. It refers to single-strength orange juice and other citrus fruit juices produced in California and sold in intra and interstate commerce, and states that they constitute part of the total trade in commerce and may be the subject of restraint and monopoly.

I don't see that it takes any question of fact from the jury.

Mr. Dixon: I don't.

Mr. Williams: It takes from them the question, your Honor, whether California juices are so different competitively from Florida juices that they

do constitute an area of effective competition, such as the Supreme Court referred to in dealing with Standard Oil of California vs. United States, 337 U.S. 293. You will find it in note 5 on page 299. Also, United Shoe Machinery case, 110 Fed. Sup. 259, dealt with this problem of defining a market which is subject to monopoly. And that is the question that should go to the jury here.

The Court: You mean there should be an instruction to the jury that there is a question of fact for the jury [3494] whether or not there is a separate market in California single-strength orange juice and other citrus juice products?

Mr. Williams: Distinct from Florida single-strength orange juice and other citrus juices, so that it is subject to be monopolized.

Mr. Dixon: I don't agree with that.

Mr. Williams: It is like the illustration I gave. You don't violate the Sherman Act if one or two companies conspire to monopolize the pencils produced in California, if all pencils produced elsewhere are just the same.

The Court: What was your citation of this footnote in the Standard Oil Case?

Mr. Williams: 337 U.S., page 299, footnote 5. I believe United Shoe Machinery refers to an identifiable segment of the market.

Mr. Dixon: The Standard Oil case that you referred to is under the Clayton Act, and the District Court clearly held it was part of the trade and commerce and subject to restraint. It was made clear, if it needed to be made clear, in the Indiana Farmers

Guide Publishing Company case, which is directly in point, and the next case cited in the next instruction, which is in a sense a combination.

The Court: Let me read this note.

Mr. Dixon: Yes, your Honor. I am sorry.

The Court: In case you are not familiar with the note, [3495] it is hard for me to get much out of it (handing Mr. Dixon a book).

Mr. Dixon: I am familiar with the case, your Honor, because I tried it in the trial court.

There is no question, in my judgment, that could possibly be involved in this case that was involved in this appeal.

The Supreme Court was answering the question as to whether the commerce involved in the Standard Oil case was substantial, comparatively speaking, in line with the International Salt case, and various other decisions, where the court had held that $500,000 worth of commerce was sufficient.

The Court: Let's approach it from the standpoint of logic. The question is this: Is it a question of fact for the jury, or a question of law for the court, whether the single-strength orange juice and other citrus fruit juices produced in California are part of the total trade and commerce and subject to restraint?

Mr. Dixon: To me there can't possibly be any question. Based upon the Indiana Farmers case.

The Court: What was the gist of the holding in the Farmers case?

Mr. Williams: We concede it could be subject to restraint, but our point is that it cannot be sub-

ject to monopoly, and that is the point that should go to the jury.

Mr. Fowle: The point is whether or not you are dealing [3496] here with a situation in which you have to monopolize all citrus fruit juices, all orange juice, whether or not the California juices can be segregated out. You have to monopolize or attempt to monopolize an entire market, or an identifiable segment of the market. If the California juice is part of the whole juice in the United States, and there is nothing to distinguish it from other juices, then it is not an identifiable segment of the market for significant fruit juices. And we are just saying that we think it is a question of fact for the jury.

Mr. Dixon: I would go even further, your Honor. The record in this case, the defendants' own witnesses, tends to indicate that there is a particular market in this area only for juices processed.

The Court: You can argue that, but the question still is, is this a question of law for the court——

Mr. Dixon: I would say definitely——

The Court: ——or a question of fact?

Mr. Dixon: ——on the basis of the undisputed question of fact.

The Court: Are you relying on the Times Picayune case, which has this statement:

"The market, as most concepts in law or economics, cannot be measured by metes and bounds, nor [3497] does the substance of the Sherman Act violations typically depend on so flexible a guide. Section 2 outlaws monopolization of any appreciable part of interstate commerce, and by Section 1 unrea-

sonable restraints are banned irrespective of the amount of commerce involved."

Is that the distinction you are drawing on now between restraint and monopoly?

Mr. Williams: That is right. We are not raising the question on restraint; we are raising it on monopoly.

The Court: Then the question is whether this is an appreciable part of a market or——

Mr. Dixon: The evidence is not in dispute here, your Honor, particularly with single-strength juices involved. It is all produced in this area that goes out of this area. Because there are really only two places where the product is produced. Florida and California. Now, they are poles apart geographically, but the juice which is processed here in California is a distinct part of the citrus juices that are sold in the national market. Because if you eliminated the juices processed here in California, then of course the only juices that would be remaining for sale would be those produced in Florida.

I don't see any problem, I am frank to say, and the defendants have admitted that this market or this trade can be the subject of a restraint under Section 1, nor certainly [3498] under Section 2 there is no difference, because the Supreme Court has said that Sections 1 and 2, not just Section 1, have a distinctive effect, a geographical and distributive significance is the language used.

The Court: All right. We have got to go on and make some decisions here.

I am going to do this to 5. I am going to put at the beginning of it this statement:

"The complaint defines citrus fruit juice as natural and frozen concentrate juice produced from by-product fruit."

And then take the instruction as it is.

The first two lines will read:

"I charge you that the single-strength orange juice and other citrus fruit juices," and so forth.

I am going to give the instruction as modified. The objection is overruled.

Now, plaintiff's 6.

Mr. Dixon: I have made a few changes there, your Honor, due to the fact that ELP is now out of the case.

The Court: What changes do you propose?

Mr. Dixon: So it reads in line 4:

"If you find that either or both of the defendants combined with ELP, Treesweet or Silzle to eliminate," [3499] and then I have struck the words, on line 13: "on the first cause of action."

The Court: Let me read it. You have "citrus fruit products"; it should be "citrus fruit juices."

Mr. Dixon: I think we should strike out on line 10 there, "in the first cause of action."

The Court: Strike out what words?

Mr. Dixon: "in the first cause of action." So it reads "by such defendants were performed."

Is your Honor going to charge on the first and second causes—this may save a little time on all of these subsequent instructions. I might say, of course, when the complaint was filed here originally it did

set up a complaint to have five causes of action. In my judgment any violation of Section 1 or 2, or both, of the Sherman Act, just gives rise to one cause of action. Of course the Robinson-Patman Act is a separate cause of action. But I didn't draft this complaint originally. It was then drafted as one cause of action alleging a violation of both sections. Because, of course, there can be only one recovery here. I mean they are not the subject of judgment under Section 1, and then an additional judgment under Section 2.

If it were a criminal action, then of course there could be as many as five different counts in the indictment. [3500]

The Court: Well, I think that there should be a verdict now that we have got the third count eliminated, a form of verdict for the plaintiff and the interrogatory, "Do you base this upon Section 1, Section 2 or both." That is my view of it right now. If there is one cause of action, they either find for or against the plaintiff with that interrogatory.

Mr. Dixon: That is the only reason I made that suggestion.

The Court: How do the defendants feel about it?

Mr. Williams: Our theory of the cause of action is a little different. Our theory is the cause of action arises from each act causing injury, and if there is more than one act of injury here claimed by the plaintiff, then there is more than one cause of action, but as far as the conspiracy itself goes, it seems to us it is only one conspiracy and you prove one set of facts to prove a conspiracy under Section

1 and you prove something else to establish it under Section 2 of the Sherman Act.

The Court: Or both?

Mr. Dixon: We can do both.

The Court: Wouldn't both come in there?

Mr. Williams: Yes. The same conspiracy might violate both acts.

Mr. Fowle: The jury has been told a number of times [3501] that there are the separate causes of action, the one dealing with restraint of trade, one dealing with monopoly, and one dealing with price discrimination. The third is out now. But I wonder if the jury isn't going to be confused if the whole matter of combinations and conspiracy and restraints of trade on the one hand, and monopolies and conspiracies to monopolize on the other hand are lumped together, and whether it would not be clearer to the jury to instruct them on the two separate causes of action as they are set forth in the complaint.

The Court: You suggest we eliminate the words, "in the first cause of action" from this?

Mr. Dixon: That was my thought, your Honor, yes.

Mr. Williams: Is there any charge of individual monopoly or monopolizing now, or is it just conspiracy to monopolize as far as Section 2 is concerned?

Mr. Dixon: That's right. And, of course, the allegation not only to conspire, but they did monopolize.

Mr. Williams: In other words, the conspiracy was successful.

Mr. Dixon: Yes, that's right, but the allegation of attempting to monopolize is out of the case under Section 2.

The Court: What is the defendants' objection to plaintiff's 6, the instruction as amended?

Mr. Williams: The first objection is our Capper-Volstead [3502] point that we raised with respect to Plaintiff's Instruction No. 2. I would like to incorporate that by reference insofar as conspiracy with ELP goes.

The Court: I will overrule that, because the instruction proceeds on, "to eliminate the competition of the plaintiff."

Mr. Williams: Our point is that ELP, EOP and Sunkist are all owned by the same growers and therefore cannot conspire under the Sherman Act and they may be treated as one entity under the Sherman Act. It is the same objection we made.

The Court: You want to ignore the corporate entities, then?

Mr. Williams: Yes. Under the Capper-Volstead Act we feel that is the correct law, although it is a novel question. It has never come up, as far as we know.

The Court: I don't see how you can do that.

Mr. Williams: This is not a case of stockholders in the corporation. It is a case of the growers, the same people, actually running the three associations.

The Court: But they are not the same people. The people that grow lemons are not the same people that grow oranges.

Mr. Williams: Many of them are.

Mr. Fisher: Most of them are. [3503]

Mr. Williams: They all stem through Sunkist. They are the same group of growers and, therefore, they can't conspire among themselves only. Therefore, we object to this which would permit a finding for the plaintiff if you had a conspiracy only among Sunkist, Exchange Lemon and Exchange Orange.

The Court: That is why I thought it would be better if ELP were out of this instruction.

Mr. Williams: If it were taken out of this instruction, we wouldn't object to it.

Mr. Dixon: I will take out ELP. I don't want to confuse the issues.

Mr. Fowle: You are taking ELP out of this instruction?

Mr. Dixon: If that is the only objection you have.

Mr. Williams: That isn't the only objection.

The Court: What is the other objection?

Mr. Williams: The other objections are our objections which we made with respect to an identifiable market and whether juice produced in California constituted such a market, with respect to the preceding instruction, and we would like to incorporate those objections in our objections to this instruction.

Mr. Dixon: Well, that doesn't bother me.

The Court: That is overruled. I have passed on that. What is the next one? [3504]

Mr. Williams: There is no statement of public injury and we object, of course, unless it is connected up with a suitable public injury instruction.

Furthermore, this does not in and of itself iden-

tify the acts that are charged to have been performed by the defendants that caused damage. It should be specific.

The Court: Elsewhere I am going to list those acts and they will know what I am talking about.

Mr. Williams: I have the objection that there is no statement that the act causing injury must be performed in furtherance of an illegal combination or conspiracy. There is also no statement that there must be a substantial restraint upon interstate commerce, because in this case any conspiracy here is entirely intrastate, so the plaintiff must be proceeding under the affecting commerce theory and not the in-commerce theory, and under the Las Vegas decision and other cases the jury must find, therefore, there is a substantial restraint of interstate trade.

The Court: You can't put everything in one instruction.

What about public injury? Should that be inserted in here?

Mr. Dixon: Well, I assumed, your Honor, again——

The Court: You say this comes into the category of what you would call formula instructions?

Mr. Dixon: Yes. [3505]

The Court: Formula instructions as distinguished from instructions on general principles present quite a problem. I don't like to give any more formula instructions than I can.

Mr. Dixon: Well, your Honor has stated the problem. I ran into it with considerable difficulty in some of the subsequent instructions which I have

submitted, because I found if I didn't proceed further with the instruction, it had no meaning. If I just left it cold without putting in any context, it wouldn't have much meaning. [3506]

I think that this instruction would be certainly proper. If your Honor is going to charge generally, as I assume you will, with reference to what the plaintiff must show to recover under violations of the Sherman Act, that is one of the reasons why one of the additional instructions here is on the so-called public injury, not as such, but that is where the stabilization of price and interference with price structure instruction comes into the case. Not as a matter of damage, but certainly it is one of the elements, perhaps, that should be shown in making a case. Price fixing need not directly affect the plaintiff in this case, and it couldn't, because there was no product for the plaintiff to sell. But that doesn't mean that the instruction wouldn't be proper.

This was an effort, your Honor, to apply 5 to the specific facts of this case, to give 5 some meaning as applied to the case.

Mr. Williams: We think, also, the first sentence is surplusage.

The Court: You have only used the word combine here, haven't you?

Mr. Dixon: Yes. The statute is combined or conspired. It is in the alternative. It doesn't make any difference.

The Court: I am going to make three suggestions and see how it reads. On line 8½, according to what I have [3507] here, although it probably should be

8, after the words "in interstate commerce," insert, "and that public injury has been proved."

On line 10, after the words, "to have been performed," insert, "in furtherance of said combination."

Mr. Dixon: This is No. 6, Judge?

The Court: Yes.

Mr. Dixon: I have line 8. I didn't have anything there. Oh, I have line 9.

The Court: I said 8½.

Mr. Dixon: I am sorry. What was your suggestion?

The Court: "and that public injury has been proved."

Line 10½, after the word "performed," insert, "in furtherance of said combination," and on line 12——

Mr. Williams: It should be illegal combination.

Mr. Dixon: I don't think that's necessary.

The Court: Let's get what I have here first. On 12½, where it says, "you should find for the plaintiff," strike out "for the plaintiff," and insert, "there was a violation of the antitrust laws and proximate causation and you should proceed to the question of damage."

Now, reading it all together:

"Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished [3508] from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find either or both defendants com-

bined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for single-strength citrus juice products, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that public injury has been proved, and that any of the acts charged to have been performed by the defendants were performed in furtherance of said combination, and that the performance of any of such acts was the proximate cause of any injury to the plaintiffs, you should find there was a violation of the antitrust laws and proximate causation, and you should proceed to the question of damage."

As now constituted, what are the defendants' objections? The same ones you made heretofore, that aren't affected by these changes, and what other?

Mr. Williams: Do you wish us to repeat those?

The Court: No, you need not repeat that. That is in the record.

Mr. Williams: The only additional one in the first sentence is surplusage.

The Court: Has plaintiff any objection? [3509]

Mr. Dixon: No, your Honor.

The Court: I will give it as modified.

Mr. Fowle: And our objections——

The Court: Your objections are overruled.

The next one is 7.

Mr. Dixon: I modified this one, your Honor, in view of the dismissal of Exchange Lemon, as follows: Strike out the words, "any two or more of the defendants."

The Court: On line 4?

Mr. Dixon: Yes.

The Court: And insert what?

Mr. Dixon: Insert the words, "either one or both of the defendants combined together with Exchange Lemon Products, TreeSweet or Silzle."

The Court: With ELP?

Mr. Williams: We have the same Capper-Volstead Act objection to ELP being included.

The Court: We took it out of the other one.

Mr. Wiliams: And we have the further objection here, and that is this says the defendants combined together. The last one just said combined and conspired.

The Court: The last one said combined——

Mr. Williams: With TreeSweet or Silzle, and we object to this under the Capper-Volstead Act, to any combination together. [3510]

The Court: I don't think "together" adds anything.

Mr. Dixon: I will take it out, if you want it out.

The Court: It doesn't add anything. You are leaving in the first and second causes of action there.

Mr. Dixon: Well, either that, or charged in the complaint, your Honor, as I suggested.

The Court: All right.

Mr. Dixon: I presume on line 13 the words should be "such act."

The Court: Line 12, you mean?

Mr. Dixon: It is 12½, Judge, maybe. "become the act of all members."

The Court: I don't like these insfructions that you should find for the plaintiff or you should find

for the defendant. You both have done a lot of that. I am going to suggest this before we discuss it. On line 13, after the word "combination," you add, "and would bind and make liable," and then dropping down to 14, "such defendants as were members or parties to the combination," and then strike out beginning with the word "combination" on 13, "and if you find that such acts damaged the plaintiffs, you should find for the plaintiff and against"——

Mr. Dixon: Yes.

The Court: What is the difference between a combination and a conspiracy? Is there any legal distinction? [3511]

Mr. Dixon: No, I don't think so, your Honor.

The Court: Do you know of any?

Mr. Fowle: No.

Mr. Williams: We know of none. We would prefer to use the word conspiracy instead of combination.

The Court: The statute uses both of them.

Mr. Williams: How about using both of them then, combination and conspiracy? I assume your instruction on conspiracy will be the same as to combination, so there will be no confusion in the jury's mind whether combination is a lesser offense than a conspiracy.

The Court: Yes, I want to do that. I will instruct the jury that combination and conspiracy mean the same thing. I was going to add on line 5, "combined or conspired," because further down it says, "part of the conspiracy or combination."

To be consistent, we will also have to put in, "and that public injury is proved."

Mr. Fowle: Where will that go, your Honor?

The Court: Well, wait a minute. That isn't necessary here because this is a different proposition. This only says—well, after "second causes of action" on line 8, "and that public injury was proven."

Now, I will read it as I now have it.

"I charge you that acts lawful in themselves may become unlawful when part of an illegal scheme or plan or when [3512] used to accomplish an illegal purpose. If you find as a fact that either one or both of the defendants combined or conspired with"——

Shall we leave out ELP? You left it out in the other one.

Mr. Dixon: That's all right. Let's take it out.

The Court: "——combined and conspired with TreeSweet or Silzle as charged in the first or second causes of action to perform any of the acts alleged by the plaintiff to have been performed as part of the conspiracy or combination charged in the first and second causes of action, and public injury was proved, and that any one or more of the acts alleged by the plaintiff to have been committed pursuant to the combination or conspiracy was committed by any one or more of the defendants that you find was a party to such combination or conspiracy, that the act or acts so committed would then become the act of all members of the combination or conspiracy, and would bind and make liable such defendants as were members or parties to the combination or conspiracy charged in the first and

second causes of action."

Mr. Williams: Well it sounds as though there are more than two defendants. Actually, liability only goes to the two defendants, and this talks like there was a big conspiracy where you have the question of distributing liability. It seems to me line 10 down could be greatly abbreviated. It [3513] confuses the jury to use language as though there were more than two defendants liable.

The Court: But one or both—make it either one or both instead of any one, Either one or both.

So then line 10 would read, "pursuant to the combination or conspiracy were committed by either one or both of the defendants. [3514]

Mr. Williams: In line 13 it speaks about becoming the act or acts of all members of the combination.

The Court: That is true. It would become the act of the co-conspirators.

Mr. Williams: Isn't that immaterial here?

The Court: Yes. But they are going to be told that. They have to know that to understand conspiracy.

"and would bind and make liable such defendants as were members."

Mr. Williams: It is these defendants.

The Court: Well, you can't say "these defendants," because they may find one was a party and one was not.

Mr. Williams: How about "the defendant that was a member"?

Mr. Dixon: "Such defendant or defendants."

The Court: "would make liable each defendant who was a member."

Mr. Dixon: Wouldn't it be better, your Honor, "to make liable such defendant or defendants"?

It doesn't make any difference——

The Court: "make liable"——

Mr. Dixon: The idea being either one or both.

The Court: "make liable each defendant who was a member."

Mr. Williams: "of the combination," and strike "or [3515] parties to."

Mr. Dixon: Are you limiting it by separating it out to one?

My thought was this, that such defendant or defendants as you find——

The Court: All right. I think that is better. "such defendant or defendants as were members or parties."

As it is now constituted, what is the defendants' objection to the instruction?

Mr. Williams: We have the same objections that we made with respect to instruction No. 5, relating to the market and the competition of California juice. I wish to incorporate those here as if fully stated.

The Court: You may. They will be incorporated by reference.

What others?

Mr. Williams: Perhaps, your Honor—do you wish us to repeat each one?

The Court: Just repeat them by subject matter

and they will be repeated by reference. The subject matter can be repeated by reference by a general stipulation here.

Mr. Williams: I was wondering whether we couldn't have a general stipulation on those objections and just apply them across the board, and then we wouldn't have to refer to them each time. [3516]

The Court: As long as you don't wind up with some other general objection. If that is what is going to be what you call your general objection.

Mr. Williams: Sometimes——

The Court: You can say it in a sentence, just as you did, that you incorporate by reference the objections relating to the market.

Mr. Williams: We can recite it each time.

The Court: What is the next one?

One of those times one of those objections might apply to an instruction. I mean in my opinion. I wouldn't want to pass it over when the time comes.

Mr. Williams: We feel that the acts claimed to have been the proximate cause of injury are not adequately identified.

The Court: Before I start talking about these acts, probably what I will do will be to put in a list of these acts. You can't put them all in one instruction.

Let the record show that I have handed counsel the Court's B.

Mr. Dixon: The third line from the bottom, "and such bearing." It says "bearings" on there now.

Mr. Williams: We have further objections.

The Court: Just a minute.

All right. Going on with the objections to 7, we will talk about "B" later, but somewhere along the line I am going [3517] to tell the jury what these acts are. For instance, I just added in pencil—"complains of six matters," and added, "which will be referred to in these instructions as the acts alleged by the plaintiff," and then we will go into these instructions where they keep talking about the acts alleged, and so forth.

Mr. Williams: I should note for the record that we may take the position that the only act that should go to the jury is No. 8 of Court's B.

The Court: We will take that up later.

What is your further objection to 7?

Mr. Williams: There is no statement that there must be a finding that there was a substantial restraint upon interstate commerce.

Mr. Dixon: That isn't a necessary reading of this charge.

The Court: This is merely pointing out that each conspirator is bound. None of these instructions can be complete in themselves.

I have yielded on this public injury business.

Any other objection?

Mr. Williams: No. That is all.

The Court: I will give 7 as now constituted and overrule the objections. [3518]

* * *

Tuesday, January 31, 1956—7:00 P.M.

The Court: Plaintiffs' 8.

All right, for the record what are the defendant's objections to Plaintiffs' proposed 8?

Mr. Williams: Well, the first is that our position is that under the facts here there must be a specific intent to restrain trade, because the necessary effect of what was done would not restrain trade.

Now, that is apparent from the fact that if these same contracts had been entered into in 1951, and Morgan Ward had chosen to give oranges to Winckler & Smith, instead of giving them to Case-Swayne, we wouldn't have had any lawsuit here, and we wouldn't have had any restraint of trade. Therefore, you have to find here specific intent to restrain trade in order to have a violation of the statute.

We have other objections. That is the first one. Do you wish to consider that first, or have them all stated?

The Court: Give me the rest of them.

Mr. Williams: It has "citrus juice products."

The Court: I have changed that to "citrus fruit juices" on line 6.

Mr. Dixon: I think the words, your Honor, again, "in the first cause of action," line 8, should probably be eliminated in view of the fact that we no longer have an attempt [3520] to monopolize charge in the case under Section 2.

Mr. Williams: Which words are these?

Mr. Dixon: Line 8, the words, "in the first cause of action," I think should be stricken.

Mr. Williams: We also have an objection that no public injury is stated, as a requirement.

The Court: This isn't a formula instruction on that point.

Mr. Dixon: This is one on intent.

The Court: This is just one principle alone.

Any other objections?

Mr. Williams: Yes. There is no statement that the act must be the proximate cause of injury.

The Court: That, again, wouldn't be applicable, because this is just on the question of intent.

Mr. Williams: And the question of substantial restraint of interstate commerce, and then the Capper-Volstead Act objection, also, applies here, I think, because it relates to a combination—it might relate to a combination between Exchange Orange and Sunkist.

The Court: Your view, Mr. Dixon, as to intent, briefly?

Mr. Dixon: It is the contention of the plaintiff that it is not necessary in any private suit for damages for the plaintiff to show a specific intent to violate either Section 1 or 2 of the Sherman Act, unless the complaint charges or [3521] deals with an attempt to monopolize under Section 2, which under the language of the decision in the Times Picayune case, a specific intent as distinguished from an objective attempt presumed from the presumption, that one intends the natural and probable results or consequences of his conduct or business arrangements, does not apply.

And, further, in support of this position the plaintiff relies upon United States vs. Patten, 226 U.S. 525 at 543;

United States vs. Masonite Corporation, 316 U.S. 265 at 275;

United States vs. Columbia Steel, 334 U.S. 495;

United States vs. Paramount Pictures, 334 U.S. 131;

Swift & Company vs. United States, 196 U.S. 375 at 396;

And see, also, United States vs. Aluminum Company of America, 148 F. 2d, 416, in which the court held that Section 2 of the Sherman Act as it was applied to that case did not require a specific intent to monopolize.

The Court: That is enough of the citations.

Line 6, the line will begin "citrus fruit juices," striking out the word "products."

On line 8 the words, "in the first cause of action" will be stricken out.

The objection is overruled. I will give instruction 8.

Mr. Williams: May I also cite for the record the Lorain [3522] Journal case as one on which we rely, because this relates to a refusal to sell, and there you must have the intent to monopolize before the refusal becomes unlawful.

Mr. Fowle: Your Honor, might I add a statement at this point?

Our principal objection is that in our view specific intent is necessary since the results complained of here do not follow necessarily and directly from the acts complained of.

Now, it seems to me if the court does not see fit to adopt that view, that at the very least it would be

proper to submit to the jury as a fact question whether or not the results in this case do follow from the acts complained of, whether they follow directly and necessarily, and that is a fact question that the jury perhaps should consider. And if they find that they do not follow directly and necessarily from the acts complained of, that the jury should then be instructed that a specific intent is necessary.

In other words, that is a correlary of the principal objection that we have to Plaintiffs' Jury Instruction No. 8.

The Court: I have your point.

Of course this instruction says, "if you find that any acts * * * actually resulted" in this. There is left, then, to the jury the question of the actual result, and the very language of the talk about refusal implies a deliberate act [3523] and not an unintentional one.

Mr. Williams: It isn't the intention to commit the act; it is the intention with respect to the results of the act of refusal.

You might change the language here to say "necessarily resulted." [3524]

The Court: How about "actually and necessarily resulted" in line 8?

Mr. Williams: That wouldn't meet all of our objections, but it would be an improvement.

Mr. Dixon: I don't think that makes any difference, Judge.

The Court: I will add "and necessarily" after the word "actually."

The Griffith case used the word "necessarily."

Mr. Dixon: That is all right. I have no objection to that.

The Court: The objection is overruled to 8 now.

Plaintiffs' 9.

Mr. Williams: This is the one that you were going to give us a form on, wasn't it?

The Court: Yes; this squints at some of the matters in that.

I would suggest that we pass this.

Plaintiffs' 10.

Mr. Williams: We have no objection if it is coupled with some proper statement about the use of circumstantial evidence.

The Court: We will pass this, also, because it involves the same problem as 9, in the sense that it may be covered by this general instruction. [3525]

Plaintiffs' 11.

Mr. Dixon: There is an error.

The Court: Where is that?

Mr. Dixon: On the bottom there. It is Judge Hall.

The Court: I had a question mark on that. It wasn't me.

It is in the same category.

Mr. Dixon: Yes; all these instructions deal with the kind and type of proof that is necessary in a conspiracy case.

The Court: We will pass 11.

Plaintiffs' 12.

Mr. Dixon: This is a form type of instruction. After the words "per se" the words should be "if such exclusion was the proximate cause of any dam-

age to the plaintiff," Strike the words "on the first cause of action."

Mr. Fowle: Where does that phrase go?

Mr. Dixon: Right after the words "per se."

The Court: "such exclusion would be unreasonable per se," and what?

Mr. Dixon: "and if such exclusion was the proximate cause of any damage to the plaintiff, you should find for the plaintiffs."

The Court: I don't get any connection between what you added and what is above. [3526]

"If you find," and so forth, and then you get down to line 11, the conclusion is, "such exclusion would be unreasonable per se," and what?

Mr. Dixon: "and if such exclusion was the proximate cause of any damage to the plaintiff, you should find for the plaintiffs."

Mr. Williams: Isn't this instruction out by reason of the fact that the attempt to monopolize is taken out?

This is the individual act of Exchange Orange, which can only be an attempt to monopolize.

This instruction is no longer applicable.

Mr. Dixon: You have still got your Section 1 charge.

Mr. Williams: That requires conspiracy, and there is no conspiracy in this charge.

It requires two people to make a contract.

The Court: He speaks of the contract between Exchange and TreeSweet, and Silzle.

Mr. Williams: What it really deals with is a re-

fusal to sell, which is an individual offense of Exchange Orange.

If it dealt with contracts, we would be dealing with the legality of each particular contract, which, as I understand it, there is no dispute about that, that they are each per se lawful.

The Court: Why don't we wind up, "such exclusion would be unreasonable per se and [3527] illegal"?

Mr. Dixon: That is satisfactory.

The Court: Then it leaves it open for other instructions.

Mr. Dixon: I will accept that.

The Court: Do you think the jury knows what "unreasonable per se" means?

Mr. Williams: We object to the use of that phrase, because we don't think the law is that it is unreasonable per se. All this deals with is an individual act of Exchange Orange Products in refusing to sell, based in a certain setting, and no court has ever held that a refusal to sell is unreasonable per se. It depends upon the facts.

The Court: There is more than a refusal to sell in there. It starts out with the contracts between EOP and TreeSweet, and Silzle, and then it brings in the refusal to sell.

Mr. Williams: What it leaves out is the specific intent to monopolize, which is necessary to make a refusal to sell unlawful.

This relates to individual acts of Exchange Orange Products, just in the setting. There is no

element of conspiracy in this charge. An element of agreement is necessary.

The Court: There is agreement between Exchange and TreeSweet.

Mr. Williams: But there is no rim on the wheel, is what it comes down to, to make the [3528] conspiracy.

The Court: I don't follow you. This doesn't have to be conspiracy. Section 1 speaks of combinations, conspiracies or contracts.

Mr. Williams: But in that case, your Honor, you must find the illegality in the contract. Here we talk about the contract between Exchange Orange and TreeSweet.

As I understand it, there is no dispute that that contract, standing alone, is lawful. So it is not in restraint of trade.

The same is true of the Silzle contract, standing alone.

So that the contract part of Section 1 of the Sherman Act does not apply to our factual situation here, because that will go to invalidating either of these two contracts, and all we have in this case is a conspiracy either under Section 1 or Section 2, and therefore the element of conspiracy should appear in this instruction.

The Court: Before we go any further, what do you say to that objection?

Mr. Dixon: It is our position, your Honor, that the contracts standing alone, and taken separately, might be valid, but when taken in connection with a refusal, so that the contracts and the refusal result

in the exclusion of a competitor from the market—and that is a question of fact for the jury—that under the cases cited any exclusion of a competitor [3529] from a substantial market by means of contracts—and in this particular case any additional act—is unreasonable per se.

It is true the refusal is one of the acts alleged as having been performed here. It is also true that the act of refusing to supply or to make a comparable arrangement was in the opinion of the plaintiff, at least, one of the reasons for the elimination of the plaintiff from that market.

That would be wholly true whether it was done as the result of a combination or conspiracy, or whether it was done as a single act or series of acts by Exchange Orange. [3530]

The Court: The words "unreasonable per se," when you read antitrust cases, talk of per se violations, price fixing and dividing markets, are per se violations which, as I understand, means that they can't be explained.

Mr. Dixon: That's right.

The Court: What is unreasonable per se? Do you use per se there in a different sense? Do you mean unreasonable in itself?

Mr. Dixon: In and of itself.

The Court: Or do you use it with some of the connotations we use around the violations in price fixing and dividing markets?

Mr. Dixon: Well, I think we would have to concede and would concede that the contract, Tree-Sweet taken separately, would not necessarily have

the effect of excluding the plaintiff from a substantial market. It might tend to have that market, if they would give them all their oranges and therefore couldn't under any circumstances make any available to the plaintiff, but it is the combination of those acts and the refusal and the effect, which is a question for a jury to find under this instruction, and the effect, if it was in fact, to exclude the plaintiff from the citrus juice market; in other words, these things alleged here, I mean covered by these instructions, I think it would come within the cases cited. Now, it is one of those instructions—— [3531]

The Court: I am talking particularly now about the per se.

Mr. Dixon: Yes.

The Court: I think we should strike out per se and say it would be unreasonable of itself or in itself.

Mr. Dixon: In and of itself; yes. That per se perhaps wouldn't have any meaning to the jury.

The Court: If we use it, we probably have to define it.

Mr. Dixon: Define it; yes.

The Court: What further objections do you have to 12?

Mr. Williams: The same objections concerning the market in California juice and Florida juice that I made with respect to requested instruction No. 5, and no statement of public injury, and no statement that the cause of injury must be performed in furtherance of an illegal combination or

conspiracy. There is no requirement of the specific intent, and substantially to restrain interstate trade and commerce. There is no statement there must be a substantial restraint of interstate trade and commerce.

The Court: Most of your later objections are on the basis this is a formula instruction, and I have taken out the last part of it, so it now reads, "such exclusion would be unreasonable in and of itself and illegal. So it isn't a formula instruction when it pertains to one element. What it pertains to actually there, is a statement that this [3532] combination of facts and circumstances, with the exclusion of plaintiff as a competitor, would be a violation of the antitrust laws.

Mr. Dixon: As a matter of law.

The Court: Yes; still leaving present the question of——

Mr. Dixon: Of causation and damage.

The Court: Of causation of the elements of special acts causing damage and various other elements. It is just on one particular phase of the case. Objection overruled.

Mr. Williams: I would add the objection, also, there is no specific intent to create or maintain a monopoly included. I think that completes [3533] it.